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APPENDIX A

2024 WL 2278222

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

ROMAN CATHOLIC DIOCESE

OF ALBANY, et al., Appellants,

v.

Maria T. VULLO, & c. et al.,

Respondents, et al., Defendants.

(And Another Related Action.)

No. 45

|

Decided May 21, 2024

Synopsis

Background: Religious employers brought action against Department of Financial Services (DFS) and its Superintendent challenging constitutionality of regulation requiring health insurance policies in New York to provide coverage for medically necessary abortion services. The Supreme Court, Albany County, Richard J. McNally, J., denied employers' motion for summary judgment, converted DFS's motions to dismiss into motions for summary judgment, and granted motions. Employers appealed.

The Supreme Court, Appellate Division, Colangelo, J., 185 A.D.3d 11, 127 N.Y.S.3d 171, affirmed. The Court of Appeals, 36 N.Y.3d 927, 160 N.E.3d 321, 135 N.Y.S.3d 663, denied leave to appeal. Certiorari was granted. The United States Supreme Court, 142 S.Ct. 421, vacated and remanded. On remand, the Supreme Court, Appellate Division, Egan, Jr., J., 206 A.D.3d 1074, 168 N.Y.S.3d 598, affirmed. Leave to appeal was granted.

Holdings: The Court of Appeals, Wilson, J., held that:

DFS's regulatory definition of "religious employer" did not violate Free Exercise Clause, and

definition of "religious employer" was not subject to strict scrutiny under Free Exercise Clause.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

Noel J. Francisco, for appellants.

Laura Etlinger, Albany, for respondents.

New York State Catholic Conference, New York Civil Liberties Union et al., Notre Dame Law School Religious Liberty Clinic, amicus curiae.

OPINION

WILSON, Chief Judge:

***1** Plaintiffs, the Roman Catholic Diocese of Albany and a variety of entities ranging from churches to religiously affiliated organizations to a single individual, provide medical insurance plans to their employees. They have challenged a regulation promulgated by the Department of Financial Services

as violative of the First Amendment of the United States Constitution. The challenged regulation requires New York employer health insurance policies that provide hospital, surgical, or medical expense coverage to include coverage for medically necessary abortion services (*see* 11 NYCRR 52.16[o][1]). Their challenge is to the regulation's exemption for "religious employers," which is defined by four factors (*see* 11 NYCRR 52.2[y]). Plaintiffs' claim, in essence, is that the exemption is too narrow, such that the First Amendment rights of certain types of religiously affiliated employers are violated because they do not meet the terms of the exemption.

This litigation began in 2016, raising a federal Free Exercise Claim that was then legally indistinguishable from *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459 (2006), which concerned insurance coverage for contraception. Notably, the statutorily defined criteria to qualify as a "religious employer" litigated in *Serio* are identical to those challenged here (*see* Insurance Law § 3221[1][16][E]). We resolved the Federal Free Exercise Claim in *Serio* by holding the insurance mandate and the accompanying "religious employer" definition and exemption were neutral and generally applicable pursuant to *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (*see* 7 N.Y.3d at 522, 825 N.Y.S.2d 653, 859 N.E.2d 459).[1]

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[1] In *Serio*, we also rejected the plaintiffs' free exercise challenge under Article I, section 3 of New York State's Constitution, though we did not interpret our constitution's clause using

Because the arguments being raised, and the regulation being challenged in this litigation were substantially the same as *Serio*, the motion court dismissed plaintiffs' complaints on the basis of *stare decisis*, and the Appellate Division affirmed on the same ground. We initially declined to hear plaintiffs' appeal and plaintiffs petitioned for certiorari from the Supreme Court of the United States.

While plaintiffs' certiorari petition was pending, the Supreme Court decided *Fulton v. Philadelphia*, 593 U.S. 522, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021). Thereafter, the Court granted plaintiffs' petition, vacated the Appellate Division's judgment, and remanded to reconsider the case in light of *Fulton*.

On remand, the Appellate Division answered the question put to it by the Supreme Court: is *Serio* still controlling precedent in light of *Fulton*? Because *Serio* was decided pursuant to *Smith*, a case the Supreme Court explicitly did not overrule in *Fulton*, the Appellate Division held that *Serio* was still good law and affirmed its previous decision that neither the medically necessary abortion regulation nor the "religious employer" exemption as defined violated the Free Exercise Clause.

***2** We agree. Under *Fulton*, both the regulation itself and the criteria delineating a "religious employer" for the purposes of the exemption are generally applicable and do not violate the Free Exercise Clause. Neither the existence of the

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Smith's rubric (*see* 7 N.Y.3d at 525, 825 N.Y.S.2d 653, 859 N.E.2d 459).

exemption in the regulation nor the defined criteria allow for "individualized exemptions" that are standardless and discretionary, nor do they allow for comparable secular conduct while discriminating against religious conduct.

I.

The Department of Financial Services is authorized to regulate "the form, content and sale of accident and health insurance policies" (Insurance Law § 3217[a]). In 1972, it promulgated a regulation stating that no health insurance policy "shall limit or exclude coverage by type of illness, accident, treatment or medical condition," outside of certain specified exceptions (11 NYCRR 52.16[c]). In 2013, pursuant to the Federal Affordable Care Act, the Department of Financial Services developed a standard health insurance policy template—referred to as the "Model Language"—to serve as a guide for required coverages and insurers. Policies that conform to the Model Language covered "medically necessary abortions."[2]

In 2016, plaintiffs commenced the first of two actions against the Department of Financial Services and its former Superintendent, Maria T. Vullo (hereinafter collectively DFS), seeking declaratory and injunctive relief. Plaintiffs challenged certain portions of the Model Language under various constitutional

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[2] As of September 2017, "medically necessary abortions" as defined in the Model Language included, among other things, "abortions in cases of rape, incest or fetal malformation." That definition is a close iteration of the Model Language issued by the Department of Financial Services in 2015 and 2016, which informed the basis of plaintiffs' challenge in their first action.

provisions, including, as relevant here, the Free Exercise Clause of the Federal and New York State Constitutions, and the separation of powers and rulemaking provision of the New York State Constitution. Plaintiffs argued that because they provide medical insurance plans to their employees out of a moral obligation to do so, the regulation forced them to fund abortion "in violation of their religious doctrines, teachings and conscience rights." DFS moved to dismiss the complaint for failure to state a cause of action and plaintiffs opposed the motion, amended the complaint to add a cause of action pursuant to the Religious Freedom Restoration Act, and cross-moved for injunctive relief.

In 2017, while those motions were pending, DFS amended 11 NYCRR part 52 to make explicit that health insurance companies *must* provide coverage for "medically necessary abortions," with an exemption for insurance policies offered by "religious employer[s]" (11 NYCRR 52.16[o][1], [2]; *id.* 52.1[p]). The definition of a "religious employer" is as follows:

> "An entity for which each of the following is true: (1) The inculcation of religious values is the purpose of the entity[;] (2) The entity primarily employs persons who share the religious tenets of the entity[;] (3) The entity serves primarily persons who share the religious tenets of the entity[;] (4) The entity is a nonprofit organization as described in section 6033(a)(2)(A) i or iii, of the Internal Revenue Code of 1986, as amended" (*id.* 52.2[y]).

Under the procedures set forth in the regulation, a "group or blanket policy that provides hospital, surgical, or medical expense coverage delivered or

issued for delivery" in New York to a "religious employer" may exclude coverage for medically necessary abortions if: (1) the entity provides the insurance carrier with an "annual certification" that the entity meets the four criteria and thus qualifies as a "religious employer" as so defined; and (2) the entity requests a contract without coverage for medically necessary abortions (*id.* 52.16[o][2][i]). The insurance carrier must then issue a rider to each primary insured, at no additional cost to the insured or the "religious employer," that provides coverage for medically necessary abortions in place of the "religious employer," and then must provide notice of the issuance of the policy and rider to the Superintendent (*id.* 52.16[o][2] [ii-iii]).

***3** Plaintiffs, who have neither tried to invoke the "religious employer" accommodation nor expressly stated that they do not qualify for it, commenced a second action against DFS challenging the amended regulation. The second complaint asserted the same causes of action in the first amended complaint but did not include any claims under the Religious Freedom Restoration Act. The motion court joined the two actions.

DFS moved to dismiss the action, arguing, among other things, that the causes of action were essentially identical to those raised in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459 (2006) and should be dismissed on the principle of *stare decisis*. Plaintiffs cross-moved for summary judgment on all their causes of action and for a preliminary injunction, offering evidence of unsuccessful legislative efforts to mandate insurance

coverage for abortion services in support of its separation of powers argument. The motion court converted DFS's motions to dismiss into motions for summary judgment pursuant to CPLR 3211(c), granted the motions, and dismissed the complaints. The court found that plaintiffs' constitutional claims were the same as those raised in *Serio*, which was binding precedent requiring the dismissal of the claims in the instant matter. The court rejected plaintiffs' attempts to distinguish the two cases and their remaining arguments. Plaintiffs appealed.

The Appellate Division unanimously affirmed (185 A.D.3d 11, 127 N.Y.S.3d 171 [3d Dept. 2020]). The court agreed that plaintiffs' arguments were the same as those raised and rejected in *Serio* (*id.* at 16, 127 N.Y.S.3d 171). The court held that like *Serio*, the challenged regulation here was a "neutral regulation" to be "uniformly applied without regard to religious belief or practice, except for those who qualif[y] for a narrowly tailored exemption" (*id.* at 17, 127 N.Y.S.3d 171).

Plaintiffs appealed from the Appellate Division's order on constitutional grounds (*see* CPLR 5601[b][1]) and sought leave to appeal to this Court. On the Court's own motion, we dismissed the appeal on the ground that no substantial constitutional question was directly involved and denied leave to appeal (36 N.Y.3d 927, 135 N.Y.S.3d 663, 160 N.E.3d 321 [2020]). Plaintiffs petitioned the Supreme Court of the United States for a writ of certiorari.

While the petition was pending, the Supreme Court decided *Fulton v. Philadelphia*, 593 U.S. 522, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021). In light of that decision,

the Supreme Court granted plaintiffs' petition, vacated the judgment, and remanded the action to the Appellate Division "for further consideration in light of *Fulton* "(*Roman Catholic Diocese of Albany v. Emami,— U.S.* —, 142 S Ct 421, 211 L.Ed.2d 247 [2021]). Justices Thomas, Alito, and Gorsuch would have granted plenary review (*id.*).

On remand, the Appellate Division answered the Supreme Court's narrow question of whether *Serio* "remains valid and controlling precedent in the wake of *Fulton*" in the affirmative (206 A.D.3d 1074, 1074, 168 N.Y.S.3d 598 [3d Dept. 2022]).[3] The court reasoned that because *Fulton* did not overrule *Smith*, upon which *Serio* primarily relied, *Serio* remains good law (*id.* at 1074–1075, 168 N.Y.S.3d 598). The court also held that nothing in *Fulton* "clearly conflicts with the holding of [*Serio*]" (*id.* at 1075, 168 N.Y.S.3d 598) and that *Serio* had taken into account aspects of prior Supreme Court rulings emphasized in *Fulton* — specifically, that "a law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions or if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (*id.*).

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[3] While this case was pending before the Appellate Division on remand, the legislature enacted a statute codifying the regulation's mandate (*see* Insurance Law §§ 3221[k][22], 4304[ss]) and its "religious employer" exemption (*see* Insurance Law §§ 3221[1][16][E][1], 4304[cc][5][A]).

***4** Additionally, the Appellate Division rejected plaintiffs' argument that *Fulton* supported the proposition that "a regulatory scheme cannot be generally applicable due to the presence of any exemptions" (*id.*). Instead, the court reasoned that *Fulton* dealt with a " 'formal system of entirely discretionary exceptions' that invited the government to decide what motives for not complying with the regulatory requirements were worthy" (*id.*, quoting *Fulton*, 593 U.S. at 536, 141 S. Ct. 1868). Therefore, the court held, "*Fulton* does not bar the holding of [*Serio*] that a regulation, like the one at issue here, was neutral and generally applicable despite the presence of exemptions upon specific criteria" (*id.*).

The Appellate Division rejected plaintiffs' remaining arguments "to the extent that they fall within the limited scope of the remand and are properly preserved for [the court's] review" and affirmed the motion court's 2019 order dismissing the complaints (*id.* at 1076, 168 N.Y.S.3d 598).

Plaintiffs appealed once again on constitutional grounds (*see* CPLR 5601[b][1]) and sought leave to appeal to this Court. We retained the appeal and denied leave as unnecessary (39 N.Y.3d 1060, 183 N.Y.S.3d 55, 203 N.E.3d 630 [2023]).

II.

The issue before us is a very narrow one. Although several Justices wrote concurring opinions in *Fulton* suggesting that *Smith* was wrongly decided and should be overruled (*see Fulton*, 593 U.S. at 543, 141 S.Ct. 1868 [Barrett, J., concurring]; *id.* at 544, 141 S.Ct. 1868 [Alito, J., oncurring]; *id.* at 618, 141 S.Ct. 1868 [Gorsuch, J., concurring]), *Smith* remains good

law, and the question before us is whether *Fulton* impaired *Smith* in a way that undoes *Serio* in whole or in part. The issue before us is further limited in two other ways. First, because *Fulton* addresses a Federal Free Exercise claim only, that is the only claim before us. Second, because *Fulton* was decided "under the rubric of general applicability" (*id.* at 533, 141 S.Ct. 1868) and not neutrality, the question before us is limited to whether *Fulton* altered Supreme Court doctrine on general applicability in a way that should cause us to revisit *Serio*.

A.

Preliminarily, the Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment (*see Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 [1940]), provides that "Congress shall make no law ... prohibiting the free exercise" of religion. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 [1993]). Importantly, in *Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990) and *Church of Lukumi*, 508 U.S. 520, 113 S.Ct. 2217 (1993), the Supreme Court held that laws incidentally burdening religion are not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.

In *Smith*, the Court synthesized a large body of its decisional law into a "valid and neutral law of general applicability" (494 U.S. at 878, 110 S.Ct. 1595) test but

did not explicitly treat "neutrality" and "general applicability" as individual parts of a test. The thrust of the Supreme Court precedent relied on by the *Smith* Court holds that even devoutly held religious beliefs must give way to generally applicable laws where the government has not explicitly targeted a religion.

***5** As the Supreme Court explained, "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities" (*id.* at 879, 110 S.Ct. 1595 [internal quotation marks omitted]). This is true notwithstanding the "devastating effects" a neutral and generally applicable law may have on religious practices or communities (*Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 451, 108 S.Ct. 1319, 99 L.Ed.2d 534 [1988] [Free Exercise Clause did not preclude government logging and road construction activities on lands long used for religious purposes by Native American Tribes]; *see also Prince v. Massachusetts*, 321 U.S. 158, 171, 64 S.Ct. 438, 88 L.Ed. 645 [1944] [holding that child labor laws can be enforced against a mother who used her children to distribute religious literature]), or the deeply held belief of religious individuals that compliance would make them a party to immoral or sinful behavior (*see Gillette v. United States*, 401 U.S. 437, 461, 91 S.Ct. 828, 28 L.Ed.2d 168 [1971] [sustaining the military Selective Service System against the claim that it violated free exercise by conscripting persons opposed to a particular war on religious grounds]; *see also United States v. Lee*, 455 U.S. 252, 258–261, 102 S.Ct. 1051, 71 L.Ed.2d 127 [1982] [concluding people whose religious beliefs prohibited the payment of Social

Security taxes could be required to pay them]). To hold otherwise would be "a constitutional anomaly," would "court[ ] anarchy," and would "make the professed doctrines of religious belief superior to the law of the land," effectively "permit[ing] every citizen to become a law unto himself" [4] (*Smith*, 494 U.S. at 879, 886, 888, 110 S.Ct. 1595).

The Court in *Fulton* expressly chose not to overrule *Smith* (*see* 593 U.S. at 533, 141 S.Ct. 1868) or the precedents it cites in which government action burdening religious beliefs or practices were upheld. Instead, *Fulton* provided elaboration as to a particular circumstance in which a law does not qualify as "generally applicable." In *Fulton*, because the City of Philadelphia's contractual nondiscrimination clause vested a city Commissioner with "sole discretion" to grant an exception to an agency for rejecting a prospective foster family based on sexual orientation, the Court held the City's policy to not be generally applicable (*id.* at 535, 536, 141 S.Ct. 1868). *Fulton* suggests two different ways in which a governmental policy will fail the test for general applicability and

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[4] Indeed, the Supreme Court cautioned that this danger "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order" (494 U.S. at 888, 110 S.Ct. 1595, quoting *Braunfeld v. Brow*n, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 [1961]).

trigger strict scrutiny under the Free Exercise Clause: (1) a law cannot invite "the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; and (2) a law cannot prohibit "religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (*id.* at 533–534, 141 S.Ct. 1868). The Court resolved *Fulton* under the first of those tests, holding that the City's nondiscrimination policy incorporated an entirely discretionary " 'mechanism for individualized exemptions' " (*id.* at 533, 141 S.Ct. 1868, quoting *Smith*, 494 U.S. at 884, 110 S.Ct. 1595) that invited "the government to decide which reasons for not complying with the policy are worthy of solicitude[ ] ... at the Commissioner's 'sole discretion' " (*id.* at 537, 141 S.Ct. 1868).

Turning back to *Serio*, in 2006, this Court held that the New York State Legislature's Women's Health and Wellness Act (WHWA) contraceptive insurance mandate's burden was the "incidental result of a 'neutral law of general applicability' " (7 N.Y.3d at 522, 825 N.Y.S.2d 653, 859 N.E.2d 459). The WHWA is designed to advance women's health and the equal treatment among genders and requires an employer's health insurance contract to provide coverage for the cost of contraceptive drugs or devices if the contract provided coverage for prescription drugs (*see id.* at 518, 825 N.Y.S.2d 653, 859 N.E.2d 459; Insurance Law § 3221[1][16]). The statute provides an exemption for "religious employers" who requested an insurance contract without coverage for contraceptive methods that were contrary to the "religious employer['s]" religious tenets, whereupon the insurer would be

obligated to offer contraception coverage to individual employees who may purchase it at their own expense (*Serio*, 7 N.Y.3d at 519, 825 N.Y.S.2d 653, 859 N.E.2d 459; Insurance Law § 3221[1][16][A], [B][i]). A "religious employer" is statutorily defined, and an entity had to meet four criteria to qualify (*Serio*, 7 N.Y.3d at 519, 825 N.Y.S.2d 653, 859 N.E.2d 459; Insurance Law § 3221[1][16][A][1]). The statutory definition of "religious employer" challenged in *Serio* is identical to the regulatory "religious employer" definition challenged here.

***6** In *Serio*, applying *Smith* and *Church of Lukumi*, we rejected the Free Exercise challenge, holding that the four-factor test delineating a "religious employer" for the purposes of the statute met the "neutral law of general applicability" test (*Serio*, 7 N.Y.3d at 522, 825 N.Y.S.2d 653, 859 N.E.2d 459). However, our analysis of the issue focused on the concept of neutrality.[5] Because *Fulton* appears to treat neutrality and general applicability as analytically distinct concepts (*but see Church of Lukumi*, 508 U.S. at 531, 113 S.Ct. 2217 ["(n)eutrality and general applicability are interrelated"]), and because *Serio* does not discuss general applicability, our task is to determine whether the "religious employer" exemption meets either of *Fulton* 's general applicability tests. We conclude that the regulatory definition for "religious employer" set forth by DFS is generally applicable within the meaning of *Fulton*.

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[5] That is unsurprising as the *Serio* plaintiffs made only a passing reference to general applicability.

B.

In *Fulton*, the City of Philadelphia stopped referring children to Catholic Social Services (CSS)—one of more than 20 foster care agencies in the City—after discovering that CSS would not certify same-sex couples to be foster parents due to its religious beliefs about marriage (*Fulton*, 593 U.S. at 526–527, 141 S.Ct. 1868). CSS and others challenged the City's referral freeze as a violation of the Federal Free Exercise Clause (*id.* at 531, 141 S.Ct. 1868). In its defense, the City explained that CSS's refusal "to certify same-sex couples violated a non-discrimination provision in its contract with the City" (*id.*). The provision stated, in relevant part, that a provider "shall not reject a child or family ... for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion" (*id.* at 535, 141 S.Ct. 1868). The Court held that provision incorporated a "mechanism of individualized exemptions" (*id.*) and such an "inclusion of a formal system of entirely discretionary exemptions ... render[ed] the contractual non-discrimination requirement not generally applicable" (*id.* at 536, 141 S.Ct. 1868). Analogizing it to the unemployment benefits system with a "good cause" exemption at issue in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court concluded that Philadelphia's non-discrimination policy "invite[d] the government to decide which reasons for not complying with the policy [we]re worthy of solicitude ... at the Commissioner's sole discretion" (*id.* at 537, 141 S.Ct. 1868), which made it not generally applicable and subject to strict scrutiny.

The "formal system of entirely discretionary" "individual exemptions" (*id.* at 536, 535, 141 S.Ct. 1868) invalidated in *Fulton* is fundamentally different from the four regulatory factors establishing the religious exemption challenged in this case.[6] *Fulton* scrupulously adopted phrases from *Smith*—"a mechanism for individualized exemptions" (*id.* at 533, 141 S.Ct. 1868, quoting *Smith*, 494 U.S. at 884, 110 S.Ct. 1595) and "a system of individual exemptions" (*id.* at 534, 141 S.Ct. 1868, quoting *Smith*, 494 U.S. at 884, 110 S.Ct. 1595)—instead of simply saying "exemptions." Thus, *Fulton* advises that when exemptions are "individual" or "individualized," they cannot be characterized as "generally applicable." Importantly, Philadelphia's system of "individual exemptions" failed *Fulton* 's general applicability test because the exemptions were "at the 'sole discretion' of the Commissioner" (*id.* at 535, 536, 537, 141 S.Ct. 1868).

***7** Courts have cautioned that individualized exemptions "create[ ] the risk that administrators will use their discretion to exempt individuals from

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[6] As noted, the regulatory definition of "religious employer" challenged here is identical to the statutory definition of "religious employer" challenged in *Serio*. That *Serio* addressed a statute and we now address a regulation is a distinction "of no moment, as it is well settled that a properly promulgated regulation is entitled to the same deference as a legislative act" (185 A.D.3d at 17, 127 N.Y.S.3d 171, citing *Raffellini v. State Farm Mut. Auto. Ins. Co.*, 9 N.Y.3d 196, 201, 848 N.Y.S.2d 1, 878 N.E.2d 583 [2007]). Thus, our analysis and holding apply equally to the regulatory and statutory factors delineating a "religious employer."

complying with the law for secular reasons, but not religious reasons" (*We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288 [2d Cir. 2021]). "Placing unbridled discretion in the hands of a government official or agency" has long been understood as highly problematic in the First Amendment context generally (*City of Lakewood v. Plain Dealer Publish. Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 [1988]; *see also id.* at 755–757, 108 S.Ct. 2138; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S.Ct. 935, 22 L.Ed.2d 162 [1969]; *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129, 112 S.Ct. 2395, 120 L.Ed.2d 101 [1992]).

There are fundamental differences between the purely discretionary system of exemptions in *Fulton* and the "religious employer" exemption at issue here. The decision to grant or deny the exemption here is not "at the sole discretion" of any single person or authority, but rather is determined by enumerated factors. The "religious employer" exemption is not subject to the discretionary determination by a municipal official that allows the government to consider the reasons for the person's conduct and whether noncompliance with the policy is "worthy of solicitude" (*Fulton*, 593 U.S. at 537, 141 S.Ct. 1868). Instead, a "religious employer" is defined by objective criteria delineated in the regulation itself and once met, the employer may claim the exemption.

The medically necessary abortion coverage requirement uniformly applies to all policies in New York State that provide hospital, surgical, or medical expense coverage (*see* 11 NYCRR 52.16[o][1]), with the exception of a "religious employer" who requests an

exemption (*id.* at 52.16[o][2]; *see also Vullo*, 185 A.D.3d at 17, 127 N.Y.S.3d 171]). There is no individualized discretionary process whereby DFS or the Superintendent may grant or deny an entity's exemption. As in *Serio*, an entity can qualify for an exemption by meeting the four factors for a "religious employer" and then requesting said exemption from its insurance carrier.[7] It is then the insurance carrier, not DFS, who issues a rider for individual coverage (*see* 11 NYCRR 52.16[o][2]). Thus, exemptions are not available for "good cause," as prohibited in *Sherbert*, nor does DFS or the insurance carrier have the authority to grant an exemption in its sole discretion as prohibited in *Fulton*.

The federal appellate courts have interpreted *Fulton* to hold that an exception based upon objective criteria is not subject to strict scrutiny (*see* e.g. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 [10th Cir. 2021], revd on other grounds 600 U.S. 570, 143 S.Ct. 2298, 216 L.Ed.2d 1131 [2023] ["Conversely, an exemption is not 'individualized' simply because it contain(s) express exceptions for objectively defined categories of persons"] [internal quotation marks and citations omitted]). As the Tenth Circuit in *Elenis* observed,

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[7] The contraceptive insurance requirement in *Serio* applied uniformly to all insurance policies providing drug coverage except to those who sought accommodations as a "religious employer" as defined by statute (*see* 7 N.Y.3d at 519–520, 825 N.Y.S.2d 653, 859 N.E.2d 459). There was no discretionary mechanism for the Superintendent to grant or deny an exemption on an individualized basis. Exemptions were given to those who met the statutory factors for a "religious employer" and who then applied for such an exemption.

"[w]hile of course it takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption, that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert* and related cases" (*id.* [internal quotation marks and citations omitted]).

***8** In contrast, federal precedent that deals with case-by-case exceptions are subject to strict scrutiny pursuant to the Federal Free Exercise Clause. In *Dahl v. Board of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733 (6th Cir. 2021), a University's vaccine mandate policy provided that " 'all student-athletes' must provide proof of at least one dose of a COVID–19 vaccine 'to maintain full involvement in the athletic department.' But '[m]edical or religious exemptions and accommodations will be considered on an *individual basis* ' " (emphasis added). The University also retained "discretion to extend exemptions in whole or in part" which is ultimately why the Sixth Circuit held the policy to be "not generally applicable" under *Fulton* (*id.*). Similarly, in *Kane v. DeBlasio*, 19 F.4th 152, 169 (2d Cir. 2021), because an arbitration procedure for a religious accommodation to a COVID–19 vaccine mandate was subject to an arbitrators' "substantial" discretionary review and the criteria was inconsistently applied, the Second Circuit held that the procedure failed the test for general applicability.

Here, the "religious employer" exemption "does not give government officials discretion to decide whether a particular individual's reasons for requesting exemption are meritorious" (*We the Patriots USA v.*

Connecticut Office of Early Childhood Dev., 76 F.4th 130, 150 [2d Cir. 2023]). Like the exemption in *We the Patriots USA*, entitlement to the exemption here has nothing to do with an individualized discretionary consideration of the reason *why* the employer seeks the accommodation. An insurance carrier grants an exemption to an entity that requests a contract without coverage for medically necessary abortions and provides an "annual certification" that it is a "religious employer" as defined by the four objective criteria (*see* 11 NYCRR 52.16[o][2][i]).[8] That process does not assess the reason why an entity is seeking an exemption. Instead, the decision to grant an exemption fits squarely within the "yes-or-no inquiry" that is different in kind from a standardless case-by-case system prohibited by *Fulton* (*see 303 Creative LLC*, 6 F.4th at 1187).

The same can be said about meeting the four factors defining a "religious employer." Plaintiffs contend that the "religious exemptions qualifying criteria" are not objective but rather "embed[ ] numerous discretionary judgments" in an adjudicator determining whether the organization qualifies or not. They claim that whether an organization "primarily" serves "persons who share the religious tenets of the entity" is a determination that is "far from objective where an organization routinely interacts with different individuals in different capacities" in addition to making an adjudicator "identify both a required level of belief and

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[8] The record here is devoid of direct evidence of the procedure for how exemptions are considered because plaintiffs opted to bring a pre-enforcement challenge to the regulation.

required quantum of common beliefs" in discerning which individuals sufficiently "share the religious tenets of the entity." Instead, plaintiffs claim, resolving whether an entity qualifies under the four criteria for a "religious employer" requires an "individualized determination that leaves substantial room for discretion."

***9** Although the factual question of whether a particular entity meets the regulatory definition can be the subject of dispute, that cannot be sufficient to render a regulation lacking in general applicability. Of course, any statutory or regulatory term must be interpreted, but if that rendered a provision discretionary and unable to survive general applicability within the meaning of *Fulton*, it is hard to imagine any scheme that would be nondiscretionary; in at least some cases there would be a question as to whether conduct met the terms of the provision. Plaintiffs themselves cite the federal contraception religious exemption as an example of a statute that passes the test for general applicability (45 CFR 147.132[a][2]). The language plaintiffs tout as consistent with the Free Exercise clause—"the exemption ... will apply to the extent that an entity described in ... this section objects, based on *its sincerely held religious beliefs* [ ]"—contains words that are subject to different interpretations, vesting the same type of discretion plaintiffs challenge here in whomever is charged with deciding what is a belief, whether that belief is religious, and whether it is sincerely held (*id.* [emphasis added]).

Thus, unless we are either prepared to say that no one claiming a religious belief may be subjected to any law

inconsistent with that belief, or are prepared to say that the only way to define which beliefs can be regulated is to leave it up to the regulated individual—both of which would contravene *Smith* and more than a century of federal free exercise jurisprudence (*see* 494 U.S. at 879, 110 S.Ct. 1595; *Gillette*, 401 U.S. at 461, 91 S.Ct. 828 ["Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government"]; *Reynolds v. United States*, 98 U.S. 145, 166–167, 25 L.Ed. 244 [1878] ["Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself"])—society must have some way to create regulatory and statutory definitions that meet the general applicability test.

The proposition that a state has the authority to cabin, through specific criteria, who qualifies as a "religious employer" is consistent with Supreme Court and other state court precedent (*see Larson v. Valente*, 456 U.S. 228, 255 n. 30, 102 S.Ct. 1673, 72 L.Ed.2d 33 [1982] [a state may require organizations "claiming the benefits of (a) religious-organization exemption" from a regulatory statute "to *prove* that (it) is a religious organization within the meaning of the (statute)"] [emphasis added]; *see also Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal 4th 527, 551, 10 Cal.Rptr.3d 283, 85 P.3d 67 (2004) ["To accomplish th(e) purposes (of proving an organization is a religious entity within the meaning of a statute) without explicitly defining the religious groups and

practices to be accommodated, in order to distinguish them from secular groups and practices not entitled to accommodation, would often be impossible"]). The complaint that some criteria are hard to determine is not a claim about lack of general applicability, nor is the claim that some are so onerous as to burden religious exercise impermissibly. For example, plaintiffs' argument that the exemption would fail to reach a convent that ministers to the poor without regard to their religion does not demonstrate a lack of general applicability, because the failure to qualify under the regulatory rubric does not invite the "government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" (*Fulton*, 593 U.S. at 533, 141 S.Ct. 1868 [internal quotation marks and citations omitted]).

It is always possible to imagine improvements to statutory or regulatory language that would make it clearer to resolve anticipated or theorical problems. But we decline to engage in a searching analysis as to whether the factors used in the "religious employer" definition are the most careful and narrowly tailored as can be envisioned, as that would effectively incorporate strict scrutiny through the back door. The purpose of the general applicability test is to decide whether a law must be *subjected* to strict scrutiny in the first instance.

***10** Accordingly, the "religious employer" exemption survives the first test of general applicability described by *Fulton*. Qualifying as a "religious employer" requires application of specific criteria, not a standardless system of discretionary case-by-case

evaluations. Neither an entity's decision to claim the exemption nor an insurer's determination as to an entity's satisfaction of the criteria invites "the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" (592 U.S. at 533, 141 S.Ct. 1175).

C.

The "religious employer" exemption also does not violate the Free Exercise Clause by permitting comparable secular conduct—*Fulton* 's second test for general applicability whereby a law cannot prohibit "religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (593 U.S. at 534, 141 S.Ct. 1868).

Here, secular employees must comply with the insurance mandate for medically necessary abortion services. Taking *Fulton* 's test as written, New York State permits no secular conduct that undermines its interests in the insurance-based provision of medically necessary abortion services. It is also helpful to remember that the "religious employer" exemption is an attempt to ameliorate the burden posed on a class of entities that would likely be the most burdened by the mandate. The exemption provides a way to accommodate religious beliefs in some cases. In doing so, the regulation favors religious exercise rather than discriminates against it (*see Serio*, 7 N.Y.3d at 522–523, 825 N.Y.S.2d 653, 859 N.E.2d 459, quoting *Catholic Charities of Sacramento, Inc.*, 32 Cal 4th at 551, 10 Cal.Rptr.3d 283, 85 P.3d 67 ["The high court has never prohibited statutory reference to religion for the purpose of accommodating religious practice. To

the contrary, the court has repeatedly indicated that it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"] [internal quotation marks and citations omitted]).

Plaintiffs do not point to any secular employers who are exempt from complying with the mandate; thus, they cannot show that New York has undermined its interest in the mandate by its treatment of secular employers. Instead, they advance a novel argument, seeking to extend the language in *Fulton* to a different situation: one in which the comparison is not of religious versus secular employers, but among different types of religious employers. Plaintiffs rely heavily on *Tandon v. Newsom* to argue for that extension of *Fulton* 's language (593 U.S. 61, 141 S.Ct. 1294, 209 L.Ed.2d 355 [2021] [per curiam] [granting motion for injunctive relief pending appeal]). In *Tandon*, the Supreme Court explained that a government regulation is not neutral or generally applicable if it treats "any comparable secular activity more favorably than religious exercise," with comparability "judged against the asserted government interest that justifies the regulation" (*id.* at 62, 141 S.Ct. 1294; *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16–19, 141 S.Ct. 63, 208 L.Ed.2d 206 [2020] [per curiam] [applying the same principle to grant injunctive relief pending appeal]; *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527, 142 S.Ct. 2407, 213 L.Ed.2d 755 [2022] [citing to *Fulton* for that principle and applying it to the application of disciplinary directives]).

Plaintiffs argue that *Tandon* should not be limited to comparable secular conduct that results in distinctions between secular and religious conduct, but should be extended to distinctions drawn among religious entities. In doing so, plaintiffs argue that *Fulton* is implicated because the "religious employer" exemption expressly exempts "some religious organizations but not others." They contend that an exemption that applies to organizations for which "the purpose of the entity" is "inculcation of religious values" only if the entity "primarily employs" and "primarily serves persons who share the religious tenets of the entity" bears no relationship to any of the State's purported interests in mandating insurance coverage for medically necessary abortions. Instead, they claim that these criteria reflect only "the State's decision that the religious beliefs of certain entities are more 'worthy of solicitude' than the religious beliefs of other entities." In effect, plaintiffs aver that the State's discrimination of certain entities that exercise their religion in a manner the State does not "prefer" is the type of conduct that *Fulton* expressly forbids. That argument is without merit.

***11** First, the Supreme Court's remand order does not ask or authorize us to innovate existing Supreme Court doctrine. Plaintiffs' proposed extension of *Tandon* is not supported by any caselaw, which instead focuses exclusively on distinctions between secular and religious conduct. Thus, as it stands, the existence of a "religious employer" exemption that does not extend to all possible religious entities does not implicate any rule concerning general applicability.

Second, the deviation from *Fulton* 's language that plaintiffs advocate for is really an argument that the "religious employer" exemption is not neutral,[9] because it targets certain beliefs and activities and not others (*see Church of Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217 ["if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral"]). But neutrality is not before us on remand from the Supreme Court.[10]

The creation of any religious accommodation necessarily requires the government to distinguish the types of entities or activities that are covered from those that are not. Although a State may not distinguish between religious denominations or entangle itself in assessments regarding "the centrality of particular beliefs or practices to a faith" (*see Smith*, 494 U.S. at 887, 110 S.Ct. 1595; *see also Catholic Charities of Sacramento*, 32 Cal 4th at 546,

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[9] Plaintiffs' argument also conflates the first and second *Fulton* tests of general applicability by invoking the individualized exemption "worthy of solicitude" language in their claim. Additionally, their argument sounds more like the Establishment Clause argument raised in *Serio* that is not at issue here (*see* 7 N.Y.3d at 528–529, 825 N.Y.S.2d 653, 859 N.E.2d 459 ["Plaintiffs contend that the legislation is invalid under *Larson* because it distinguishes between religious organizations that are exempt from the contraception requirements and those that are not"]).

[10] Moreover, by choosing to bring a pre-enforcement challenge, plaintiffs have avoided providing details about whether they qualify for the "religious employer" exemption or, if not, which criteria they fail to satisfy. That information is obviously essential to proper assessment of their argument that they are being treated differently from a comparable group.

10 Cal.Rptr.3d 283, 85 P.3d 67 [making a similar point]), that is not what the regulation's definition of a "religious employer" does.

As we explained in *Serio*, qualification as a "religious employer" depends on "the nature of [an employer's] activities" and business structure, not its "denominations" or beliefs (*see* 7 N.Y.3d at 529, 825 N.Y.S.2d 653, 859 N.E.2d 459). The parallel regulation here similarly does not differentiate among religious beliefs; instead, it differentiates between religious and non-religious entities. For example, a person having two part-time jobs, one cleaning the floors of a Catholic church and one cleaning the floors of a soup kitchen run by a Catholic charity that serves all people, may be entitled to obtain insurance covering medically necessary abortions from one but not the other. Nothing about that situation disfavors any religion based on its beliefs; it differentiates between employers and the type of entity. Accordingly, the "religious employer" exemption is generally applicable under both tests delineated in *Fulton*. *Fulton* therefore does not undermine *Serio* in any manner that affects the disposition of this case.

D.

For the first time in a supplementary brief to the Appellate Division on remand from the Supreme Court, plaintiffs raised an additional argument about general applicability. Plaintiffs argue that because the medically necessary abortion regulation does not apply to employers who self-insure, who provide no employee health insurance at all, or address the coverage needs of those who are not employed, there are "holes" that defeat the general applicability of the

regulation, making it subject to strict scrutiny. Plaintiffs argue that these "holes" in the coverage effectively exempt secular employers from the coverage requirement, while simultaneously declining to exempt comparable religious employers. DFS responds that plaintiffs miss the point of the regulation, which is limited in scope to employers who obtain group health insurance policies issued or delivered in New York State. This argument, raised for the first time in plaintiffs' reply brief on remand to the Appellate Division, is not preserved for our review (*see People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 407, 408, 813 N.Y.S.2d 27, 846 N.E.2d 457 [2006]).

III.

***12** The sole issue on remand is whether *Fulton* disturbs our holding in *Serio* when evaluating DFS's promulgation of a "religious employer" exemption pursuant to the Free Exercise Clause. Although *Fulton* provides a new articulation of the tests for general applicability, and although *Serio* did not turn on general applicability, *Fulton* 's articulation does not mean that the parallel "religious employer" exemptions here and in *Serio* are unconstitutional. Accordingly, the Appellate Division order should be affirmed, without costs.

Judges Rivera, Garcia, Singas, Cannataro, Troutman and Iannacci concur. Judge Halligan took no part.

Order affirmed, without costs.

APPENDIX B

206 A.D.3d 1074, 168 N.Y.S.3d 598
(Mem), 2022 N.Y. Slip Op. 03550

****1** Roman Catholic Diocese
of Albany et al., Appellants,

v

Maria T. Vullo, as Acting Superintendent of
Department of Financial Services, et al.,
Respondents, et al., Defendants. (And Another
Related Action.)

Supreme Court, Appellate Division,
Third Department, New York
529350B
June 2, 2022

CITE TITLE AS: Roman Catholic

Diocese of Albany v Vullo

HEADNOTE

Courts

Stare Decisis

Valid and Controlling State Precedent upon Remand from United States Supreme Court

Tobin and Dempf, LLP, Albany (Victoria Dorfman of Jones Day, Washington, DC, of counsel), for appellants.

Letitia James, Attorney General, Albany (Laura Etlinger of counsel), for respondents.

Edward T. Mechmann, New York City, for New York State Catholic Conference, amicus curiae.

New York Civil Liberties Union, New York City (Gabriella Larios of counsel), for New York Civil Liberties Union and another, amici curiae.

Egan Jr., J.P. Appeal (upon remand from the Supreme Court of the United States) from an order of the Supreme Court (McNally Jr., J.), entered January 10, 2019 in Albany County, which, among other things, granted a motion by defendants Superintendent of Financial Services and Department of Financial Services for summary judgment dismissing the complaints against them.

The present matter is before us on remand from the Supreme Court of the United States for further consideration in light of its decision in *Fulton v Philadelphia* (593 US—, 141 S Ct 1868 [2021]). The underlying facts are set out in our original decision (185 AD3d 11 [2020], *appeal dismissed and lv denied* 36 NY3d 927 [2020], *vacated and remanded sub nom. Roman Catholic Diocese of Albany v Emami*, 595 US —, 142 S Ct 421 [2021]). Briefly, plaintiffs challenge a regulatory scheme that, as amended, requires that health insurance policies in New York cover "medically necessary abortions" but exempts those policies provided by entities falling within the regulatory definition of "religious employers" (11 NYCRR 52.1 [p]; *see* 52.2 [y]). Plaintiffs argue, in relevant part, that the regulatory provisions impair their right to the free exercise of religion guaranteed by the US Constitution (*see* US Const 1st, 14th

Amends; *Cantwell v Connecticut*, 310 US 296, 303 [1940]). We determined that the Court of Appeals had considered and rejected an indistinguishable challenge in *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006], *cert denied* 552 US 816 [2007]) and that plaintiffs' contention failed "by operation of the doctrine of stare decisis" (185 AD3d at 16). Our task upon remand is therefore the limited one of assessing whether *Catholic Charities* remains valid and controlling precedent in the wake of *Fulton*.

In that regard, *Fulton* did not explicitly overrule *Catholic Charities*. *Fulton* also did not revisit or overturn the existing rule "that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable" (***1075** *Fulton v Philadelphia*, 593 US at —, 141 S Ct at 1876; *see Employment Div., Dept. of Human Resources of Ore. v Smith*, 494 US 872, 878-879 [1990]). It was that standard that formed the basis for the Court of Appeals' decision in *Catholic Charities* (*see* 7 NY3d at 521-523), and that standard remains good law.

As for whether anything in *Fulton* clearly conflicts with the holding of *Catholic Charities*, plaintiffs note that *Fulton* emphasizes aspects of prior rulings of the Supreme Court of the United States that *Catholic Charities* did not, such as that "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (****2** *Fulton v Philadelphia*,

593 US at—, 141 S Ct at 1877 [internal quotation marks, brackets and citations omitted]; *see Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520, 533 [1993]; *Employment Div., Dept. of Human Resources of Ore. v Smith*, 494 US at 884). Those qualifications predated the decision in *Catholic Charities*, however, and the cases establishing them were cited in it (*see Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 521-523). Plaintiffs' further belief that *Fulton* held that a regulatory scheme cannot be generally applicable due to the presence of any exemptions—as opposed to "a formal system of entirely discretionary exceptions" that invited the government to decide what motives for not complying with the regulatory requirement were worthy—is not compelled by the language of *Fulton* and is not shared by subsequent cases interpreting it (*Fulton v Philadelphia*, 593 US at —, 141 S Ct at 1878; *see Kane v De Blasio*, 19 F4th 152, 165-166 [2d Cir 2021]; *We The Patriots USA, Inc. v Hochul*, 17 F4th 266, 288-289 [2d Cir 2021]; *Does 1-6 v Mills*, 16 F4th 20, 29-30 [1st Cir 2021], *cert denied* 595 US —, 142 S Ct 1112 [2022]; *303 Creative LLC v Elenis*, 6 F4th 1160, 1187 [10th Cir 2021], *cert granted* 595 US —, 142 S Ct 1106 [2022]). Accordingly, *Fulton* does not bar the holding of *Catholic Charities* that a regulation, like the one at issue here, was neutral and generally applicable despite the presence of exemptions based upon specified criteria (*see Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 519-520, 522-523).

In sum, even assuming that *Fulton* renders it "debatable" whether the Court of Appeals would reach the same result in *Catholic Charities* today or suggests that the Supreme Court of the United States might not

approve of that result, *Catholic Charities* "is not directly inconsistent with the rationale ***1076** employed by the United States Supreme Court in any subsequent case, and is thus binding on us as an intermediate appellate court" (*Torres v City of New York*, 177 AD2d 97, 105 [1992], *lv denied* 80 NY2d 759 [1992], *cert denied* 507 US 986 [1993]; *see People v Costello*, 101 AD2d 244, 247 [1984]). It follows that, upon our consideration of *Fulton*, *Catholic Charities* remains controlling and entitled to stare decisis effect. Plaintiffs' remaining arguments, to the extent that they fall within the limited scope of the remand and are properly preserved for our review, are unavailing. Thus, we affirm for the reasons stated in our original opinion and order.

Colangelo, Ceresia and Fisher, JJ., concur. Ordered that the order is affirmed, without costs. **[Prior Case History: 2018 NY Slip Op 33829(U).]**

Copr. (C) 2024, Secretary of State, State of New York

APPENDIX C

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 2, 2020 529350

ROMAN CATHOLIC DIOCESE
OF ALBANY et al.,
Appellants,

v

MARIA T. VULLO, as
Superintendent of Financial
Services, et al.,
Respondents, et al.,
Defendants.

OPINION
AND ORDER

(And Another Related Action.)

Calendar Date: May 18, 2020
Before: Garry, P.J., Clark, Aarons, Pritzker and Colangelo, JJ.

Tobin and Dempf, LLP, Albany (Michael L. Costello of counsel), for appellants.

Letitia James, Attorney General, Albany (Laura Etlinger of counsel), for respondents.

Edward T. Mechmann, New York City, for New York State Catholic Conference, amicus curiae.

Colangelo, J.

Appeal from an order of the Supreme Court (McNally Jr., J.), entered January 10, 2019 in Albany County, which, among other things, granted a motion by defendants Superintendent of Financial Services and Department of Financial Services for summary judgment dismissing the complaints against them.

Plaintiffs—several religious organizations, a single individual and a construction company—collectively challenge a regulation of defendant Superintendent of Financial Services requiring that health insurance policies in New York provide coverage for medically necessary abortion services. The regulation specifically exempts "religious employers," a term defined in the regulation, from the coverage requirement (*see* 11 NYCRR 52.1[p][1]; 52.2[y]). Plaintiffs challenge the regulation under the free exercise of religion, free speech, expression and association, and equal protection provisions of the US and NY Constitutions, certain statutory provisions and the separation of powers doctrine.

The Superintendent is empowered to promulgate regulations establishing "minimum standards" for, among other things, the "content and sale of accident and health insurance policies" offered in this state (Insurance Law § 3217[a]). The Superintendent is authorized to, among other things, "prescribe" and "amend, in writing, rules and regulations and issue orders and guidance involving financial products and services, not inconsistent with," among other statutes,

"the [I]nsurance [L]aw" (Financial Services Law § 302[a]).[1] In 2013, in response to regulations implementing the Federal Affordable Care Act (*see* The Patient Protection and Affordable Care Act, Pub L 111-148, 124 Stat 119 [111th Cong, 2d Sess, Mar. 23 2010]) that required each state to identify a "base-benchmark" plan to guide required coverage of essential health benefits (45 CFR 156.100[a], [b]; *see* 45 CFR 156.110[a]), defendant Department of Financial Services (hereinafter DFS) developed a standard health insurance policy template, referred to as the "Model Language" (*see* Department of Financial Services, Accident and Health Product Filings, https://www.dfs.ny.gov/apps_and_licensing/health_insurers/model_language). An insurance policy issued in accordance with the Model Language covered medically necessary abortions (*see* Department of Financial Services, Accident and Health Product Filings, Outpatient and Professional Services, at 6–7, https://www.dfs.ny.gov/system/files/documents/2020/04/outpatient-and-professional-services.doc [last update Apr. 13, 2020]).

In April 2016, plaintiffs commenced the first of two actions against the Superintendent and DFS (hereinafter collectively referred to as defendants), as well as several of their health insurance companies,[2] seeking to invalidate certain provisions of the Model Language pertaining to medically necessary

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[1] Insurance Law § 3221 sets forth the standard provisions that must be included in health insurance policies providing major medical or comprehensive-type coverage to be delivered or issued in New York.

[2] The insurance companies did not appear in the action.

abortions. In this action for declaratory and injunctive relief, plaintiffs asserted that, based upon their religious beliefs, they hold "moral, ethical, conscience and religious" opposition to "the inclusion of coverage and funding of all abortions." Defendants moved to dismiss the complaint for failure to state a cause of action. Plaintiffs opposed, submitted an amended complaint[3] and cross-moved for injunctive relief (*see* CPLR 6311). In 2017, while the motions were pending, the Superintendent amended 11 NYCRR part 52 to make explicit that health insurance companies must provide coverage for "medically necessary abortions," with an exemption for insurance policies offered by "[r]eligious employers" (11 NYCRR 52.1[p]; *see* 11 NYCRR 52.2[y]).[4] Thereafter, plaintiffs commenced a second action, challenging the 2017 regulation. The complaint in the second action mirrored the amended complaint in the first action, except that it contained the additional claim that the regulation violated the separation of powers doctrine and rule-making provisions of the NY Constitution and did not assert the claim pursuant to the Religious Freedom Restoration Act. Supreme Court joined the two actions.[5]

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[3] The amended complaint asserted a claim under the Religious Freedom Restoration Act of 1993 (*see* 42 USC § 2000bb *et seq.*).

[4] Plaintiffs do not contend on appeal that they qualify as "religious employers" for purposes of the exemption.

[5] Although Supreme Court maintained that these actions were consolidated, the court continued to use both captions and index numbers in the order on appeal (*see e.g. Matter of*

After the two actions were joined, defendants moved to dismiss the complaints and plaintiffs cross-moved for an order granting summary judgment and a preliminary injunction. Supreme Court granted defendants' motion dismissing the complaints, finding that plaintiffs failed to meaningfully distinguish their federal and state religious, speech and association claims from those presented and rejected by the Court of Appeals in *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006], *cert denied* 552 US 816 [2007]) and, therefore, the principle of stare decisis "require[ed] dismissal of plaintiffs['] constitutional claims." The court further concluded that the amended regulation did not violate the separation of powers doctrine and that it was "not an improper delegation of legislative authority to [DFS]." Plaintiffs appeal.

We affirm. As an initial matter, plaintiffs contend that *Catholic Charities of Diocese of Albany* should not apply here because the nature of the conduct governed by the regulation at issue—medically necessary abortion procedures—is more morally and religiously offensive to them than the conduct upheld by the Court of Appeals in *Catholic Charities of Diocese of Albany*. In defense of the regulation at issue, defendants argue that the constitutional issues raised by plaintiffs were squarely addressed and rejected by the Court in *Catholic Charities of Diocese of Albany*, and that such decision is controlling and binding precedent that preempts de novo review by this Court. In essence, plaintiffs' position boils down to the

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Consolidated Edison Co. of N.Y., Inc. v New York State Bd. of Real Prop. Servs., 176 AD3d 1433, 1436–1437 [2019]).

argument that, based upon their religious beliefs, there is a fundamental difference between prescribing contraceptives and performing an abortion procedure. The crux of defendants' argument is that there is no substantive difference between an abortion and any other medically necessary procedure. Neither argument proves particularly satisfying: plaintiffs' position because when viewed through the dispassionate prism of judicial analysis, it amounts to a distinction without a legal difference, in addition to the fact that it would require this Court to enter the thicket of making a religious value judgment; and defendants' position because it ignores the twin realities that the contrary view is held with deep religious fervency and that this particular "medically necessary" procedure has been among the most divisive issues in our politics for several decades, despite the effort of the Supreme Court of the United States to put it to rest over 47 years ago (*see Roe v Wade*, 410 US 113 [1973]). The ultimate resolution of this issue may well lie in another arena, outside of our judicial purview.

Our recourse as judges, when confronted with this or any issue of such constitutional dimension, controversial or otherwise, is more straightforward—to apply neutral principles to the issue at hand and, through the rigors of judicial reasoning, arrive at a resolution of the specific controversy before us. Chief among such neutral principles, particularly for an intermediate appellate court, is stare decisis. That doctrine, when applied to the precise issues presented by this appeal, proves decisive here in determining the constitutional claims advanced by plaintiffs that were

addressed and rejected by the Court of Appeals in *Catholic Charities of Diocese of Albany*.

At issue in *Catholic Charities of Diocese of Albany* was the validity of a provision of the Women's Health and Wellness Act (*see* L 2002, ch 554 [hereinafter WHWA]) that requires health insurance policies that provide coverage for prescription drugs to include coverage for prescription contraceptives (*see Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 518). The WHWA also provided an exemption from coverage for "religious employers" (Insurance Law § 3221[*l*][16][E]), which exemption contains the identical criteria as the exemption applicable here (*see* 11 NYCRR 52.2[y]). In that action, the Court of Appeals rejected each of the plaintiffs' federal and state constitutional challenges to the statute. As the constitutional arguments raised by plaintiffs here are the same as those raised and rejected in *Catholic Charities of Diocese of Albany*, Supreme Court properly concluded that they must meet the same fate by operation of the doctrine of stare decisis. "Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court will generally be followed in subsequent cases presenting the same legal problem" (*Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015] [internal quotation marks and citations omitted]).

The overriding reason for such rejection—equally applicable in the instant case—was that the WHWA set forth a neutral directive with respect to prescription medications to be uniformly applied without regard to religious belief or practice, except for

those who qualified for a narrowly tailored religious exemption (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 522–526). The same analysis applies to the regulation at issue here—a neutral regulation that treats, in terms of insurance coverage, medically necessary abortions the same as any other medically necessary procedure (*see* 11 NYCRR 52.1[p][1]). The factual differences in these cases are immaterial to the relevant legal analyses that are identical in both cases. In addition, the fact that a regulation is at issue here as opposed to a statute enacted by the Legislature in *Catholic Charities of Diocese of Albany* is of no moment, as it is well settled that a properly promulgated regulation is entitled to the same deference as a legislative act (*see Raffellini v State Farm Mut. Auto Ins. Co.*, 9 NY3d 196, 201 [2007]). No compelling reason has been presented to this Court to depart from that holding.[6] Accordingly, Supreme Court properly dismissed plaintiffs' constitutional claims, which were addressed in *Catholic Charities of Diocese of Albany*, on the basis of stare decisis.[7]

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[6] The challenged regulation does not violate plaintiffs' state statutory rights under the Human Rights Law or the Religious Corporation Law. Although the Court of Appeals in *Catholic Charities of Diocese of Albany* did not address these claims, this Court did in that case and rejected them, and its reasoning controls here (*Catholic Charities of the Diocese of Albany v Serio*, 28 AD3d 115, 136–137 [2006], *affd* 7 NY3d 510 [2006], *cert denied* 552 US 816 [2007]).

[7] Although the plaintiffs in *Catholic Charities of Diocese of Albany* did not assert an equal protection claim, the analysis and rulings of the Court of Appeals require rejection of that claim raised by plaintiffs here. The distinction between qualifying "religious employers" and other religious entities for purposes of the exemption is not a denominal classification (*see* 7 NY3d at

Plaintiffs' challenge to the instant regulation on the ground that, in promulgating it, the Superintendent exceeded regulatory authority, was also properly rejected by Supreme Court. Plaintiffs argue that the regulation at issue, which they characterize as an "abortion mandate," violates the separation of powers and rule-making provisions of NY Constitution, article III, § 1 and NY Constitution, article IV, § 8. As the Court of Appeals has recognized, "[s]eparation of powers challenges often involve the question of whether a regulatory body has exceeded the scope of its delegated powers and encroached upon the legislative domain of policymaking" (*Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 608 [2018]). "The constitutional principle of separation of powers requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Matter of Dry Harbor Nursing Home v Zucker*, 175 AD3d 770, 772–773 [2019] [internal quotation marks, brackets and citations omitted]). "As a creature of the Legislature, an agency is clothed with those powers expressly conferred by its authorizing statute, as well those required by necessary implication" (*Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 221 [2017] [internal quotation marks and citation omitted]; *see Matter of New York State Bd. of Regents v State Univ. of N.Y.*, 178 AD3d 11, 19 [2019]). To this end, "an agency can adopt regulations that go beyond the text of its enabling legislation, provided they are not inconsistent with the statutory language

528–529), and the Court of Appeals expressly so stated. The distinction turns on the basis of a religious organization's activities and has a rational basis (*see id.* at 529).

or its underlying purposes" (*Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d at 609 [internal quotation marks, brackets and citation omitted]). Thus, it is undisputed that the Legislature may delegate authority to an administrative body to, by regulation, determine the best methods for pursuing objectives articulated and outlined by legislation. However, "[i]f an agency promulgates a rule beyond the power it was granted by the [L]egislature, it usurps the legislative role and violates the doctrine of separation of powers" (*Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 260 [2018]).

There is no rigid test to determine whether, in a particular case, an administrative agency has exceeded its authority. Because the boundary between proper administrative rulemaking and legislative policymaking is difficult to define, the Court of Appeals developed a set of factors or, in the words of that Court, "coalescing circumstances," to be used as a guide to determine whether the legislative branch of government has ceded its fundamental policy-making responsibility to an administrative agency (*Boreali v Axelrod*, 71 NY2d 1, 11 [1987]; *see Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d at 609–610; *Reardon v Global Cash Card, Inc.*, 179 AD3d 1228, 1230–1231 [2020]; *Matter of LeadingAge N.Y., Inc. v Shah*, 153 AD3d 10, 16–18 [2017], *affd* 32 NY3d 249 [2018]). The *Boreali* factors include (1) whether the agency merely "balance[d] costs and benefits according to preexisting guidelines [or] instead made value judgements entailing difficult and complex choices between broad policy goals to resolve social problems," (2) whether the agency

"wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance," (3) "whether the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve" and (4) "whether the agency used any special expertise or [technical] competence" in the development of the challenged regulation (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 610–612 [2015] [internal quotation marks, brackets and citations omitted]).

We agree with Supreme Court that an analysis of the *Boreali* factors weighs in favor of rejecting plaintiffs' challenge that the Superintendent exceeded regulatory authority in promulgating the regulation at issue here. The first *Boreali* factor is met by virtue of the fact that the instant regulation is based upon longstanding legislative and regulatory efforts to standardize and simplify health insurance coverages. The directive set forth in Insurance Law § 3217(b)(1) that regulations promulgated pursuant to the statute ensure "reasonable standardization and simplification of [health insurance] coverages" undergirds a longstanding 1972 regulation that prohibits a health insurance policy from limiting or excluding coverage based on the "type of illness, accident, treatment or medical condition," except in several enumerated cases not applicable here (11 NYCRR 52.16[c]). It necessarily follows from this non-exclusion directive—as well as the regulations issued in accordance with the Model Language provisions of the Affordable Care Act pertaining to surgical procedures (*see* 11 NYCRR 52.6, 52.7)—that any medically necessary surgery

include "medically necessary" abortion procedures, as set forth in the regulation at issue here (*see* 11 NYCRR 52.1[p][1]). With regard to the second *Boreali* factor, rather than writing on a "clean slate" to create their "own set of rules without the benefit of legislative authority," defendants, by the instant regulation, made explicit what was implicitly mandated in Insurance Law § 3217 and the 1972 regulation—that insurance coverage of specific treatments and procedures must tend toward being inclusive rather than exclusive when medical necessity is present (*see* 11 NYCRR 52.6, 52.7, 52.16; *see also* Insurance Law §§ 4900[a]; 4904).

With respect to the third *Boreali* "circumstance" relating to putative legislative efforts in an area embraced by the regulation, the mere fact that several futile legislative efforts were undertaken to either include or exclude coverage for medically necessary abortions does not support a finding of a separation of powers violation. Aside from the fact that the Legislature may decline to act for any number of reasons—including a judgment that further legislation is unnecessary in light of the current regulatory framework—here, the proposed bills never cleared their respective committees, a situation hardly indicative of the "vigorous debate" referred to in the third *Boreali* factor (*National Rest. Assn. v New York City Dept. of Health & Mental Hygiene*, 148 AD3d 169, 178 [2017]; *see Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d at 265–266). Moreover, none of the bills mentioned by plaintiffs was introduced after the 2017 regulation at issue was promulgated (*see Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 170 [1993], *cert denied* 512 US 1213 [1994]). The

presence of multiple unsuccessful bills on a subject within an agency's authority may well reflect a consensus that the law "already delegates to [the agency] the authority" to act on the matter (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historical Preserv.*, 27 NY3d 174, 184 [2016]; *see Matter of National Rest. Assn. v Commissioner of Labor*, 141 AD3d 185, 192 [2016]).

Finally regarding the fourth *Boreali* factor, we find that making the judgment to include medically necessary abortion procedures under the insurance coverage umbrella by promulgating the instant regulation was well within the expertise and competence of the Superintendent. Indeed, the Superintendent is charged by statute with the responsibility for standardizing health insurance coverages (*see* Insurance Law § 3217[b][1], [4]).

Thus, the "coalescing circumstances" set forth in *Boreali* weigh, on balance, in favor of sustaining the instant regulation. In short, the instant regulation makes explicit what is, at the very least, implicit in more general regulations unquestionably based upon statutory authority—that "medically necessary" procedures should be covered without regard to the underlying reason for them. The regulation at issue simply makes clear that one type of medically necessary procedure is within that broad legislative and regulatory ambit (*see* Financial Services Law §§ 202[c]; 302[a]; Insurance Law § 3217[a]). We therefore agree with Supreme Court's finding that the Superintendent had the authority to promulgate the regulation at issue. As the court correctly found, the "promulgation of 11 NYCRR 52.1(p) is derived from the above statutory mandates and thus is not an

improper delegation of legislative authority to DFS." To the extent that we have not expressly discussed any of plaintiffs' remaining contentions, they have been considered and found to be without merit.

Garry, P.J., Clark, Aarons and Pritzker, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

s/ Robert D. Mayberger
Robert D. Mayberger
Clerk of the Court

APPENDIX D

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENEE MORGIEWICZ; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION; AND MURNANE BUILDING CONTRACTORS, INC.; Plaintiffs,	DECISION AND ORDER Index No. 7536-17 RECEIVED 2019 JAN 10 AM 10:58 ALBANY COUNTY CLERK

-against-

MARIA T. VULLO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; AND NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants.

APPEARANCES:

Tobin and Dempf, LLP
Attorneys for Plaintiffs
(Michael L. Costello, Esq., of Counsel)
Office and Post Office Address
515 Broadway, 4th Floor
Albany, New York 12207

Hon. Barbara D. Underwood
Attorney General for the State of New York
Attorneys for Defendants
(Adrienne Kerwin, Esq., of Counsel) ‘
The Capitol
Albany, New York 12224

MCNALLY, J.

Pending before the Court is a consolidated matter whereby plaintiffs, employers affiliated with the Catholic Church or similar religious denominations, are challenging a regulation adopted by New York State Department of Financial Services ("NYSDFS"). The regulation at issue involves insurance coverage which plaintiffs collectively argue contains an "undisclosed" requirement to provide abortion services thereby imposing a substantial burden on their core

religious beliefs. Both matters (Action No. 1 - Index No. 2070-16 and Action No. 2 - Index No. 7536-17) (hereinafter "Action 1" and "Action 2") have dispositive motions pending.[1] Plaintiffs oppose dismissal of their actions as sought by defendants. The Court has heard oral argument and has accepted supplemental submissions by the parties.

Plaintiffs' consolidated action contains a number of challenges, under the New York State and Federal Constitutions, involving what plaintiffs term an "abortion mandate" by New York State. Plaintiffs assert the "abortion mandate" forces church institutions, employers, and individuals, to provide health insurance to their employees which cover abortion and abortion related services. Plaintiffs state the mandate places them at the center of the following moral dilemma: on the one hand abortion is in direct conflict with the teachings of their respective faiths; while on the other hand the parties believe they have a moral duty to consider the well-being of their employees which necessarily includes providing just wages and benefits such as health insurance. Plaintiffs argue defendants have surreptitiously mandated coverage for abortion under the service category of "medically necessary" surgery. This was not disclosed to plaintiffs, who now claim they have unwittingly providing for the funding of objectionable coverage by the payment of premiums and co-pays.

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[1] The causes of action in the Amended Verified Complaint in Action 1 and Verified Complaint in Action 2 are nearly identical. The Verified Complaint in Action 2 contains a separation of powers argument (Sixth Cause of Action) not contained in the Amended Verified Complaint in Action 1.

Pursuant to the statutory and regulatory framework found within New York State's Insurance Law, abortion and abortion related services must be covered. Under the Insurance Law the NYSDFS's Superintendent is authorized to promulgate regulations "necessary or desirable to establish minimum standards . . . for the form, content, and sale" of health insurance polices (Insurance Law § 3217). Pursuant to New York Insurance Law § 3221, health insurance policies providing major medical or comprehensive-type coverage to be delivered or issued in New York State are regulated as to form and content by the NYSDFS. Health insurance providers are regulated, pursuant to Insurance Law § 4303, which dictates policy coverage, language, and benefits.

Plaintiffs "abortion mandate" moniker is derived, in part, from the adoption of an amendment to the Insurance Department's regulations which states the following:

> (1) Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, **insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary**.
>
> (2) Section 52.16(o) of this Part makes explicit that group and blanket **insurance policies that**

> **provide hospital, surgical, or medical expense coverage delivered or issued for delivery in this State shall not exclude coverage for medically necessary abortions**. Section 52.16(o) of this Part also provides for an optional, limited exemption for religious employers as provided in that section while ensuring that coverage is maintained for any insured seeking a medically necessary abortion (11 NYCRR § 52(p)) (emphasis added).

Likewise, plaintiffs point to "model language" issued by NYSDFS, on September 2017, requiring employers offering health insurance benefits, to include in their renewal contracts the following:

> We Cover medically necessary abortions including abortions in cases of rape, incest or fetal malformation. [We Cover elective abortions [for one (1) procedure per Member, per [calendar year; Plan Year].

As a result of the above, plaintiffs filed the instant actions and this matter ensued.

It is well settled that "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (*Napierski v Finn*, 229 AD2d 869, 870 [3d Dept 1996] [internal quotation marks and citations omitted]). In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (*Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The

evidence must be construed in a light most favorable to the party opposing the motion (*Dykstra v Winridge Condominium One*, 175 AD2d 482 [3d Dept 1991]). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Initially, the Court must address whether plaintiffs State and Federal Constitutional claims must be dismissed given the Court of Appeals decision in *Catholic Charities of Diocese of Albany v. Serio*, 7 NY3d 510 [2006]) (hereinafter "*Catholic Charities*"). In *Catholic Charities*, plaintiffs were faith-based organizations affiliated with the Catholic Church and challenged the New York State Legislature's enactment of the Women's Heath and Wellness Act ("WHWA"). The WHWA required employer health insurance contracts to include coverage for the cost of contraceptives for its employees. The WHWA did provide an exemption for religious employers so long as they met certain criteria which would enable them to contract for a plan that did not contain such coverage. However, plaintiffs in *Catholic Charities* did not qualify for the exemption (*Catholic Charities of Diocese of Albany*, 7NY3d at 520).

Given the religious organization's moral objection to the mandatory coverage for contraceptives, plaintiffs in *Catholic Charities* argued the legislation compelled them to violate their religious beliefs and was otherwise unconstitutional. Ultimately, the Court of

Appeals rejected plaintiffs' claims (*Catholic Charities of Diocese of Albany*, 7 NY3d 510).

Defendants urge this Court to dismiss plaintiffs' constitutional claims based upon the precedent set forth in the Court of Appeal's holding in *Catholic Charities*. This Court, of course, is obligated to follow the determinations of the Court of Appeals. "In order for a statement of law made by the Court of Appeals to have a binding effect, . . . [the Court] must have addressed an issue that was before" it (*Robinson Motor Xpress, Inc., v HSBC Bank, USA*, 37 AD3d 117, 123 [2d Dept 2006]) (citations omitted). "Principals are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision" (*Robinson Motor Xpress, Inc.*, 37 AD3d at 123) (citations omitted).

Here, plaintiffs attempt to preserve their State and Federal Constitutional claims by arguing the following distinguishing factors. First, plaintiffs argue the claims in *Catholic Charities* were disposed on a motion for summary judgment, here defendants have filed motions to dismiss. The Court would note that since defendants filed their motion to dismiss in Action 1, the Court converted it to a motion for summary judgment. In Action 2, plaintiffs have cross-moved for summary judgment. The Court does not consider the procedural posture of this case to be a distinguishing factor from that of *Catholic Charities*.

Plaintiffs also contend that the plaintiffs in *Catholic Charities* challenged a statute (i.e. the WHWA) whereas here, plaintiffs are challenging a regulation. Contrary to plaintiffs' argument, a duly promulgated

regulation has the same force of law as a statute (*Raffellini v State Farm Mut. Auto Ins. Co.*, 9 NY3d 196, 201 [2007]). Thus, the Court finds the challenges in both cases to be similar in this regard.

Next, plaintiffs assert that the regulation in this case does not contain a "carve-out" exemption similar to the one contained in the WHWA. Defendants counter plaintiffs' claim by demonstrating that the regulation was amended to include an exemption similar to the exemption addressed in *Catholic Charities* (11 NYCRR § 52.1(p)(2)).

Finally, petitioners most notably argue the two cases are different in that this case involves abortion and *Catholic Charities* dealt with coverage for contraceptives. Literally speaking, the use of contraceptives, to prevent pregnancy, is obviously different than abortion, the act of terminating a pregnancy. Legally, however, petitioners' claims challenging medical coverage for both contraceptives and abortion are identical. Plaintiffs believe contraceptives and abortion to be a moral "evil" and the legal mandate compelling coverage for the same a violation of their core religious beliefs causing a deprivation of rights.

The Court finds the constitutional claims challenged in this case to be same as those raised in *Catholic Charities*. Given that the Court of Appeal's addressed and rejected the same arguments, *Catholic Charities* is binding precedent requiring dismissal of plaintiffs constitutional claims in this matter.

As for plaintiffs consolidated action, in the only remaining claim, plaintiffs argue the "abortion mandate" violates the separation of powers and rule

making provision of Article III, § 1, and Article IV, § 8 of the New York State Constitution.

The Court of Appeals, in *Matter of LeadingAge N.Y., Inc., v Shah* (2018 NY Slip Op 06965 [2018]), recently enunciated the following:

> The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions. This principle requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies. Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator. Thus, a legislature may enact a general statute that reflects its policy choice and grants authority to an executive agency to adopt and enforce regulations that expand upon the statutory text by filling in details consistent with that enabling legislation. If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers (*Matter of LeadingAge N.Y., Inc.* at *11–12) (internal quotation marks and citations omitted).

Plaintiffs argue the "abortion mandate" is an improper delegation of legislative authority to an administrative agency. The nature of the inquiry as it relates to such an allegation is whether the legislative branch of government intended, as evidenced by the scope and language of the enabling legislation, "to

grant regulatory authority over a specific subject matter to an administrative agency which exists as part of the coequal executive branch" (*Boreali v Axelrod*, 71 NY2d 1, 15 [1987]).

The *Boreali* factors include (1) whether the agency merely "balance[d] costs and benefits according to preexisting guidelines," or instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems", (2) whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance", (3) "whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve", and (4) whether any "special expertise or technical competence" was involved in the development of the challenged regulation (*Greater N.Y. Taxi Assn, v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 610–612 [2015]). These factors are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power (*Greater N.Y. Taxi Assn.* 25 NY3d at 612).

The Court has considered the *Boreali* factors. Here, the Financial Services Law §§ 202(a) and 302 provide the NYSDFS's Superintendent with substantial authority to promulgate regulations. Section 3217 of the Insurance Law expressly authorizes the Superintendent to issue regulations that establish minimum standards for health insurance policies issued in New York State. As stated above, the insurance regulations require that all basic and major medical health care policies issued in New York State

provide coverage for surgical services (11 NYCRR § 52). As a result, insurance polices that provide hospital, surgical, or medical expense coverage are required, under the law, to include coverage for abortions that are medically necessary. The promulgation of 11 NYCRR § 52(p) is derived from the above statutory mandates and thus is not an improper delegation of legislative authority to NYSDFS.

Turning now to plaintiffs' request for a preliminary injunction, a court evaluating a motion for a preliminary injunction must be mindful that "[t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" (*Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]) Further, "the remedy is considered a drastic one, which should be used sparingly" (*McLaughlin, Piven, Vogel v. Nolan & Co.*, 114 AD2d 165, 172 [2d Dept 1986]). As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*Doe v Axelrod*, 73 NY2d 748 [1988]). The court must determine if the moving party has established a likelihood of success on the merits, that it will suffer irreparable harm if the relief is not granted, and that equities weigh in the moving party's favor (CPLR § 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Plaintiffs preliminary injunction application seeks to prevent enforcement of the "abortion mandate" implemented by NYSDFS. Plaintiffs argue they have met the threshold requirement for a preliminary injunction. Given this Court's determination that *Catholic Charities* is binding precedent, plaintiffs can

not established a likelihood of success on the merits or that plaintiffs will suffer irreparable harm if the relief sought is not granted. Likewise, this Court finds, when balancing the equities in this matter, granting the preliminary injunction would only serve to limit the health, medical, and reproductive rights of women insured by plaintiffs, which goes against this State's strong commitment to protecting such rights. Therefore plaintiffs' application for a preliminary injunction must be denied.

The Court has reviewed the parties remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination (*Hubbard v County of Madison*, 71 AD3d 1313 [3d Dept 2010]).

It is hereby,

ORDERED, that summary judgment is granted and the consolidated action is hereby dismissed.

This shall constitute the Decision and Order of the Court. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR § 2220. The parties are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED!

ENTER.

Dated: December 28, 2018
Albany, New York

s/ Richard J. McNally, Jr.
RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

Action No. 1

1. Verified Complaint dated April 29, 2016.
2. Notice of Motion dated September 30, 2016, Affirmation of Rachel Maman Kish, Esq., with annexed exhibit, Memorandum of Law.
3. Amended Verified Complaint dated October 26, 2016.
4. Notice of Cross-Motion dated December 28, 2016, Affirmation of Michael L. Costello, Esq., with annexed exhibits, Affidavit of Edward B. Scharfenberger with annexed exhibits, Affidavit of Sister Robert Mullen with annexed exhibits, Affidavit of Kevin Pestke, Affidavit of Charles Caccavale, affidavit of William H. Love with annexed exhibit, Affidavit of Terry R. Lavalley with annexed exhibits, Affidavit of Ann L. Nolte, Affidavit of Patrick T. Murnane with annexed exhibit, Affidavit of John Fontanella, Memorandum of Law.
5. Letter by Rachel Maman Kish, Esq., dated November 16, 2016.
6. Reply Memorandum of Law submitted by Rachel Maman Kish, Esq. Dated January 23, 2017.
7. Reply Affirmation of Michael L. Costello, Esq., dated January 26, 2016, Memorandum of Law.

Action No. 2

1. Verified Complaint dated November 21, 2017.
2. Notice of Motion dated February 2, 2018, Affirmation of Adrienne J. Kerwin, Esq. with annexed exhibits, Memorandum of Law.

3. Notice of Cross-Motion dated May 17, 2018, Affirmation of Michael L. Costello, Esq., in Opposition to Defendants' Motion and in Support of Plaintiffs' Cross-Motion for Summary Judgment with annexed exhibits, Affidavit of Edward B. Scharfenberger in Opposition to Defendants' Motion and in Support of Plaintiffs' Cross-Motion for Summary Judgment with annexed exhibits, Memorandum of Law
4. Reply Memorandum of Law submitted by Adrienne J. Kerwin, Esq. and Helena O. Pederson, Esq. dated May 31, 2018.
5. Letter by Michael L. Costello, Esq. dated October 25, 2018 with exhibit.

APPENDIX E

State of New York
Court of Appeals

Decided and Entered on the twenty-fourth day of November, 2020

Present, Hon. Janet DiFiore, *Chief Judge*, ***presiding.***

Mo. No. 2020-549

Roman Catholic Diocese of Albany, et al.,
Appellants,

v.

Maria T. Vullo, &c. et al.,
Respondents,

et al.,
Defendants.

(And Another Related Action.)

Appellant having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is further

ORDERED, that the motion for leave to appeal is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge DiFiore and Judges Rivera, Stein, Garcia, Wilson and Feinman concur.

Judge Fahey dissents and votes to retain the appeal.

s/ John P. Asiello
John P. Asiello
Clerk of the Court

APPENDIX F

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY,	**AFFIDAVIT OF EDWARD B. SCHARFENBERGER** Index No. 02070-16 RJI No. 01-1219-16 Hon. Richard J. McNally, Jr.

N.Y.; TERESIAN HOUSE
NURSING HOME
COMPANY, INC.;
RENÉE MORGIEWICZ;
AND MURNANE
BUILDING
CONTRACTORS, INC.;
Plaintiffs,

--against--

MARIA T. VULLO,
SUPERINTENDENT,
NEW YORK STATE
DEPARTMENT OF
FINANCIAL SERVICES;
CAPITAL DISTRICT
PHYSICIANS' HEALTH
PLAN, INC.; CDPHP
UNIVERSAL BENEFITS,
INC.; HEALTHNOW
NEW YORK INC.;
UNITEDHEALTH CARE
OF NEW YORK, INC.;
MVP HEALTH CARE,
INC.; EXCELLUS
HEALTH PLAN, INC.;
INDEPENDENT
HEALTH
ASSOCIATION, INC.,
Defendants.

STATE OF NEW YORK)
COUNTY OF ALBANY)SS.:

EDWARD B. SCHARFENBERGER, being duly sworn, deposes and says:

FIRST: I am the bishop of The Roman Catholic Diocese, Albany, New York.

SECOND: I hold a Bachelor's degree in Theology from Pontifical Gregorian University, a Licentiate in Sacred Theology from the Academy of St. Alphonsus, a Licentiate in Canon Law from Catholic University of America and a Juris Doctor of Law degree from Fordham University.

THIRD: I was ordained to the priesthood in 1973 and ordained bishop of The Roman Catholic Diocese of Albany, New York in 2014 ("Diocese of Albany"). I have served as the bishop of Albany since that date.

FOURTH: Based on my educational background and my 43 years of ministry as a Catholic priest and Bishop, I am fully familiar with Roman Catholic religious beliefs, theology and religious traditions.

FIFTH: I am a member of the New York State Catholic Conference of Bishops, which is the public policy arm of the Roman Catholic Church in New York ("Catholic Conference"). I serve as the chair of the Public Policy Committee of the Catholic Conference.

SIXTH: I am a member of the United States Catholic Conference of Bishops, which is the national association of Catholic Bishops.

SEVENTH: The Diocese of Albany was established in 1847. The New York State Legislature pursuant to Chapter 283 of the Laws of 1941 incorporated the Diocese of Albany as a special act corporation. I serve as its bishop and president.

EIGHTH: The geographic area of the Diocese of Albany covers fourteen counties in upstate New York. It has 126 parishes and two apostolates serving a Catholic population of approximately 325,000. Within the Diocese of Albany there are 176 diocesan priests, forty-five religious order priests, 117 ordained deacons, forty-nine religious brothers and 545 religious sisters. The educational ministry of the Diocese of Albany includes nineteen parish schools serving 4,383 students and four diocesan high schools serving 1,014 students.

NINTH: The Diocese of Albany sponsors campus ministries through fourteen chapters staffed by chaplains, priests and deacons. It sponsors catechetical programs throughout the Diocese with 132 leaders, 3002 catechists and forty-three youth ministries. The Diocese of Albany sponsors parish faith formation programs for 13,527 elementary and junior high school students and 4,751 high school students. Located within the Diocese of Albany are eight retreat houses and houses of prayer as well as several religious communities of men, motherhouses, novitiates and scholasticates for sisters, noviaties for religious sisters, and religious communities of women.

TENTH: Catholic Charities of the Diocese of Albany ("Catholic Charities") is a special act corporation of the New York State Legislature and is an ecclesiastical part of the Diocese of Albany. I served as the chair of its board of trustees and corporate members. Catholic Charities administers the social service ministry of the Diocese of Albany and provides human service programs and services. The Catholic Church has a rooted tradition that ministries of a social service nature which are wholly inseparable

from the broader apostolic mission of the Church and that such works of charity and mercy are constitutive of the gospel of Jesus Christ. Catholic Charities, accordingly, constitutes a part of my ministry as Bishop of the Diocese of Albany.

ELEVENTH: The Diocese of Albany, including its parishes, schools, cemeteries, and Catholic Charities provides health insurance to 1,074 employees.

TWELFTH: The Diocese of Albany and Catholic Charities cannot offer, pay for or provide employment benefits to its employees that are inconsistent with Catholic religious teaching and belief. The Diocese of Albany and Catholic Charities as parts of the Catholic Church cannot be complicit, directly or indirectly in facilitating or funding conduct or activities that violate Catholic religious teaching or belief. That is why the health insurance plans of the Diocese of Albany and Catholic Charities must contain exclusions or exemptions for coverage of abortion, voluntary sterilization and contraception.

THIRTEENTH: Insurance carriers underwrite the health plans offered by the Diocese of Albany and Catholic Charities to their employees, including the Capital District Physicians' Health Plan and Blue Shield of Northeastern New York.

FOURTEENTH: I am advised that the health plans offered to employees of the Diocese of Albany and Catholic Charities are regulated by the New York State Department of Financial Services ("DFS") and that it has mandated all health insurance carriers in New York State to affirmatively provide coverage for abortion services, including therapeutic, non-

therapeutic and elective abortions, in employer health insurance plans offered to employees.

FIFTEENTH: The Diocese of Albany and Catholic Charities have protested inclusion of abortion coverage in their employer health insurance plans. (Attached hereto as Exhibit "A").

SIXTEENTH: I am further advised that the DFS has refused to allow exemptions from abortion coverage in the health care plans provided to the Diocese of Albany and Catholic Charities.

SEVENTEENTH: Because of the refusal of DFS to provide exemptions or exclusions for abortion coverage, the Catholic Church, through the Diocese of Albany and Catholic Charities, are placed in the intolerable position of facilitating, paying for, and otherwise being complicit in the procurement and provision of abortion services.

EIGHTEENTH: Providing access to health care coverage to our employees flows from the religious, moral and legal obligation we have to pay just wages.

NINETEENTH: Discontinuing health care coverage for our employees violates this religious, moral and legal obligation and I am advised would subject the Diocese of Albany, Catholic Charities and our employees to severe annual penalties.

TWENTIETH: Providing abortion coverage under coercion in the health insurance benefit plans of the Diocese of Albany and Catholic Charities poses an intolerable burden on the religious freedom rights of the Catholic Church, has a chilling effect regarding its right to live according to its religious teachings and now further threatens to substantially and directly

burden its religious teachings regarding the Church's prohibition against abortion.

TWENTY-FIRST: Catholic religious teaching and belief regarding abortion is clear and unambiguous. Human life must be respected and protected absolutely from the moment of conception to natural death. From the first moment of existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to life. Since the first century, the Church has affirmed the moral evil of abortion. Direct abortion, that is to say, abortion willed either as an end or as a means, is gravely contrary to the moral law. The Diocese of Albany and Catholic Charities cannot directly or indirectly cooperate in the facilitation, funding, procurement or provision of abortion services.

TWENTY-SECOND: In Catholic religious teaching, the practice of abortion "is always morally evil" and "murder" as Pope John Paul II, points out in his 1995 encyclical letter, *Evangelium Vitae*:

> The deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end. It is in fact a grave act of disobedience to the moral law, and indeed to God himself, the author and guarantor of that law; it contradicts the fundamental virtues of justice and charity. 'Nothing and no one can in any way permit the killing of an innocent human being, whether a fetus or an embryo, an infant or an adult, an old person, or one suffering from an incurable disease, or a person who is dying.

Furthermore, no one is permitted to ask for this act of killing, either for himself or herself or for another person entrusted to his or her care, nor can he or she consent to it, either explicitly or implicitly. Nor can any authority legitimately recommend or permit such an action.'

As far as the right to life is concerned, every innocent human being is absolutely equal to all others. This equality is the basis of all authentic social relationships which, to be truly such, can only be founded on truth and justice, recognizing and protecting every man and woman as a person and not as an object to be used. Before the moral norm which prohibits the direct taking of the life of an innocent human being 'there are no privileges or exceptions for anyone. It makes no difference whether one is the master of the world or the poorest of the poor on the face of the earth. Before the demands of morality we are all absolutely equal.'

The moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very beginning of life. No one more absolutely innocent could be imagined.

[W]hat is at stake is so important that, from the standpoint of moral obligation, the mere probability that a human person is involved would suffice to justify an absolutely clear prohibition of any intervention aimed at killing a human embryo.

(Pope John Paul II, *Evangelium Vitae* (1995), ¶¶ 57, 58 [attached hereto as Exhibit "B"].)

TWENTY-THIRD: It should be noted that Pope John Paul II specifically expressed the Church's concern regarding the increasingly blurred perception involving abortion. Indeed, the Holy Father exercised considerable foresight in *Evangeliun Vitae* in observing that "human life is sacred and inviolable at every moment of existence."

TWENTY-FOURTH: The Ethical and Religious Directives for Catholic Health Care Services affirms this religious teaching in practice:

> Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any associations with abortion providers).

(United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition, Directive 45 [Attached hereto as Exhibit "C").

TWENTY-FIFTH: The mere act of the institutional Catholic Church offering its employees access to abortion, through employment benefit programs, with

coerced subsidization, constitutes the Church's complicity, as a matter of Catholic religious belief, in the funding and facilitation of conduct contrary to Catholic religious teaching and belief. It is a complete abrogation of the religious freedom rights of the Catholic Church for the government to coerce the Church into complicity with conduct—i.e., abortion—that the Church clearly and unequivocally teaches to be sinful and evil.

TWENTY-SIXTH: Moreover, all Catholics are called upon to live these values honestly, faithfully and without qualification. As the United States Catholic Bishops stated, in their pastoral letter *Living the Gospel of Life*:

> Today, Catholics risk cooperating in a false pluralism. Secular society will allow believers to have whatever moral convictions they please—as long as they keep them on the private preserves of their consciences, in their homes and churches, and out of the public arena. Democracy is not a substitute for morality, nor a panacea for immorality. Its value stands—or falls—with the values which it embodies and promotes. *Only* tireless promotion of the truth about the human person can infuse democracy with the right values. This is what Jesus meant when He asked us to be leaven in society. American Catholics have long sought to assimilate into U.S. cultural life. But in assimilating, we have too often been digested. We have been *changed* by our culture too much, and we have *changed it not enough*. If we are leaven, we must bring to our culture the whole Gospel, which is a *Gospel of life and joy*. That is our vocation as believers. And there is no

> better place to start than promoting the beauty and sanctity of human life. Those who would claim to promote the cause of life through violence or the threat of violence contradict this Gospel at its core.

(Pastoral Letter of the National Conference of Catholic Bishops, *Letter the Gospel of Life*, (November 1998), ¶¶ 7, 25 & 30 [attached hereto as Exhibit "D"].)

TWENTY-SEVENTH: Our Holy Father, Pope Francis, recently reaffirmed that abortion represents a "horrendous crime" and a "very grave sin." (cruxnow.com/Vatican, November 20, 2016. [attached hereto as Exhibit "E"]).

TWENTY-EIGHTH: By coercing the Catholic Church into violating its own core religious teachings regarding abortion, by redefining the Catholic Church wholly inconsistent with its own theology and tradition and by forcing it to be complicit in such religiously prohibited practices, the State has substantially infringed upon the right of the Church to honestly and sincerely proclaim the truth of Catholic teaching by serving as a living example. The State is forcing the Diocese of Albany and Catholic Charities, and, consequently, the Catholic Church itself, into cooperating in the "false pluralism" rejected by the Catholic Bishops of the United States in *Living the Gospel of Life*. Indeed, because all people are called by God to live the Gospel of Life, the Church must set an example for all by doing so itself.

TWENTY-NINTH: It is respectfully requested that appropriate injunctive relief be granted by the Court.

s/ Edward B. Scharfenberger
EDWARD B. SCHARFENBERGER

Sworn to before me this 15th
day of December, 2016

s/ Michael L. Costello
Notary Public

MICHAEL L. COSTELLO
NOTARY PUBLIC,
STATE OF NEW YORK
Registration No. 02CO4650023
Qualified in Albany County
Commission Expires October 31, 2017

APPENDIX G

<table>
<tr><td colspan="2">STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY</td></tr>
<tr><td>THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; AND</td><td>AFFIDAVIT OF TERRY R. LaVALLEY
Index No. 02070-16
RJI No. 01-1219-16
Hon. Richard J. McNally, Jr.</td></tr>
</table>

MURNANE BUILDING
CONTRACTORS, INC.;
Plaintiffs,

--against--

MARIA T. VULLO,
SUPERINTENDENT, NEW
YORK STATE
DEPARTMENT OF
FINANCIAL SERVICES;
CAPITAL DISTRICT
PHYSICIANS' HEALTH
PLAN, INC.; CDPHP
UNIVERSAL BENEFITS,
INC.; HEALTHNOW NEW
YORK INC.;
UNITEDHEALTH CARE OF
NEW YORK, INC.; MVP
HEALTH CARE, INC.;
EXCELLUS HEALTH
PLAN, INC.:
INDEPENDENT HEALTH
ASSOCIATION, INC.,
Defendants.

STATE OF NEW YORK)
COUNTY OF ST. LAWRENCE)SS.:

TERRY R. LaVALLEY, being duly sworn, deposes and says:

FIRST: I am the bishop of The Roman Catholic Diocese of Ogdensburg, New York.

SECOND: I hold a Bachelor's degree from the University of the State of New York, a Certificate of Studies in Philosophy from Wadhams Hall Seminary - College, a Master of Divinity degree from Christ The King Seminary in East Aurora, New York, a Master in Canon Law and Licentiate Degree in Canon Law from St. Paul's University, Ottawa, Ontario, Canada.

THIRD: I was ordained to the priesthood in 1988 and ordained bishop of The Roman Catholic Diocese of Ogdensburg, New York in 2010 ("Diocese of Ogdensburg"). I have served as the bishop of Ogdensburg since that date.

FOURTH: Based on my educational background and my twenty-eight-year ministry as a Catholic priest and bishop, I am fully familiar with Roman Catholic religious beliefs, theology and religious traditions.

FIFTH: I am a member of the New York State Catholic Conference of Bishops, which is the public policy arm of the Roman Catholic Church in New York ("Catholic Conference").

SIXTH: I am a member of the United States Catholic Conference of Catholic Bishops which is the national association of Catholic Bishops.

SEVENTH: The Diocese of Ogdensburg was established in 1872. I serve as its bishop and president.

EIGHTH: The geographic area of the Diocese of Ogdensburg includes all of St. Lawrence, Franklin, Clinton, Jefferson, Lewis and Essex counties and portions of Hamilton and Herkimer counties. It has 93 parishes, 7 missions, 92 priests, and 90 sisters. The

educational ministry of the Diocese of Ogdensburg includes 10 elementary school and 2 high schools.

NINTH: Catholic Charities of the Diocese of Ogdensburg ("Catholic Charities") was established in 1917. It is a Special Act corporation of the New York State Legislature and is an ecclesiastical part of the Diocese of Ogdensburg. I serve as the chair of its board of trustees. Catholic Charities administers the social service ministry of the Diocese of Ogdensburg and provides human service programs and services. The Catholic Church has a rooted tradition that ministries of a social service nature which are wholly inseparable from the broader apostolic mission of the Church and that such works of charity and mercy are constitutive of the gospel of Jesus Christ. Catholic Charities, accordingly, constitutes a part of my ministry as Bishop of the Diocese of Ogdensburg.

TENTH: The Diocese of Ogdensburg including its parishes, schools and Catholic Charities provides health insurance to 249 employees.

ELEVENTH: The Diocese of Ogdensburg and Catholic Charities cannot offer, pay for or provide employment benefits to its employees that are inconsistent with Catholic religious teaching and belief. The Diocese of Ogdensburg and Catholic Charities as parts of the Catholic Church cannot be complicit, directly or indirectly in facilitating or funding conduct or activities that violate Catholic religious teaching or belief. That is why the health insurance plans of the Diocese of Ogdensburg and Catholic Charities must contain exclusions or exemptions for coverage of abortion, voluntary sterilization and contraception.

TWELFTH: The insurance carrier that underwrites the health plan offered by the Diocese of Ogdensburg and Catholic Charities to their employees, is Excellus.

THIRTEENTH: I am advised that the health plans offered to employees of the Diocese of Ogdensburg and Catholic Charities are regulated by the New York State Department of Financial Services ("DFS") and that it has mandated all health insurance carriers in New York State to affirmatively provide coverage for abortion services, including therapeutic, non-therapeutic and elective abortions, in employer health insurance plans offered to employees.

FOURTEENTH: The Diocese of Ogdensburg has protested inclusion of abortion coverage in its employer health insurance plan. (Attached hereto as Exhibit "A").

FIFTEENTH: Excellus and DFS have refused to allow exemptions from abortion coverage in the health care plan provided to the Diocese of Ogdensburg. (Attached hereto as Exhibit "B").

SIXTEENTH: Because of the refusal of DFS and Excellus exemptions or exclusions for abortion coverage, the Catholic Church, through the Diocese of Ogdensburg, are placed in the intolerable position of facilitating, paying for, and otherwise being complicit in the procurement and provision of abortion services.

SEVENTEENTH: Providing access to health care coverage to our employees flows from the religious, moral and legal obligation we have to pay just wages.

EIGHTEENTH: Discontinuing health care coverage for our employees violates this religious, moral and legal obligation and I am advised would

subject the Diocese of Ogdensburg and our employees to severe annual penalties.

NINETIETH: Providing abortion coverage under coercion in the health insurance benefit plan of the Diocese of Ogdensburg poses an intolerable burden on the religious freedom rights of the Catholic Church, has a chilling effect regarding its right to live according to its religious teachings and now further threatens to substantially and directly burden its religious teachings regarding the Church's prohibition against abortion.

TWENTIETH: Catholic religious teaching and belief regarding abortion is clear and unambiguous. Human life must be respected and protected absolutely from the moment of conception to natural death. From the first moment of existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life. Since the first century, the Church has affirmed the moral evil of abortion. Direct abortion, that is to say, abortion willed either as an end or as a means, is gravely contrary to the moral law. The Diocese of Ogdensburg cannot directly or indirectly cooperate in the facilitation, funding, procurement or provision of abortion services.

TWENTY-FIRST: In Catholic religious teaching, the practice of abortion "is always morally evil" and "murder" as Pope John Paul II, points out in his 1995 encyclical letter, *Evangelium Vitae*:

> The deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end. It is in fact a grave act of

disobedience to the moral law, and indeed to God himself, the author and guarantor of that law; it contradicts the fundamental virtues of justice and charity. 'Nothing and no one can in any way permit the killing of an innocent human being, whether a fetus or an embryo, an infant or an adult, an old person, or one suffering from an incurable disease, or a person who is dying. Furthermore, no one is permitted to ask for this act of killing, either for himself or herself or for another person entrusted to his or her care, nor can he or she consent to it, either explicitly or implicitly. Nor can any authority legitimately recommend or permit such an action.'

As far as the right to life is concerned, every innocent human being is absolutely equal to all others. This equality is the basis of all authentic social relationships which, to be truly such, can only be founded on truth and justice, recognizing and protecting every man and woman as a person and not as an object to be used.

Before the moral norm which prohibits the direct taking of the life of an innocent human being 'there are no privileges or exceptions for anyone. It makes no difference whether one is the master of the world or the poorest of the poor on the face of the earth. Before the demands of morality we are all absolutely equal.'

The moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very

> beginning of life. No one more absolutely innocent could be imagined.
>
> [W]hat is at stake is so important that, from the standpoint of moral obligation, the mere probability that a human person is involved would suffice to justify an absolutely clear prohibition of any intervention aimed at killing a human embryo.

(Pope John Paul II, *Evangelium Vitae* (1995), ¶¶ 57, 58 [attached hereto as Exhibit "C"].)

TWENTY-SECOND: It should be noted that Pope John Paul II specifically expressed the Church's concern regarding the increasingly blurred perception involving abortion. Indeed, the Holy Father exercised considerable foresight in *Evangelium Vitae* in observing that "human life is sacred and inviolable at every moment of existence."

TWENTY-THIRD: The Ethical and Religious Directives for Catholic Health Care Services affirms this religious teaching in practice:

> Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned

> about the danger of scandal in any associations with abortion providers).

(United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition, Directive 45 [Attached hereto as Exhibit "D").

TWENTY-FOURTH: The mere act of the institutional Catholic Church offering its employees access to abortion, through employment benefit programs, with coerced subsidization, constitutes the Church's complicity, as a matter of Catholic religious belief, in the funding and facilitation of conduct contrary to Catholic religious teaching and belief. It is a complete abrogation of the religious freedom rights of the Catholic Church for the government to coerce the Church into complicity with conduct—i.e., abortion—that the Church clearly and unequivocally teaches to be sinful and evil.

TWENTY-FIFTH: Moreover, all Catholics are called upon to live these values honestly, faithfully and without qualification. As the United States Catholic Bishops stated, in their pastoral letter *Living the Gospel of Life*:

> Today, Catholics risk cooperating in a false pluralism. Secular society will allow believers to have whatever moral convictions they please—as long as they keep them on the private preserves of their consciences, in their homes and churches, and out of the public arena. Democracy is not a substitute for morality, nor a panacea for immorality. Its value stands—or falls—with the values which it embodies and promotes. *Only* tireless promotion of the truth about the human

> person can infuse democracy with the right values. This is what Jesus meant when He asked us to be leaven in society. American Catholics have long sought to assimilate into U.S. cultural life. But in assimilating, we have too often been digested. We have been *changed* by our culture too much, and we have *changed it not enough*. If we are leaven, we must bring to our culture the whole Gospel, which is a *Gospel of life and joy*. That is our vocation as believers. And there is no better place to start than promoting the beauty and sanctity of human life. Those who would claim to promote the cause of life through violence or the threat of violence contradict this Gospel at its core.

(Pastoral Letter of the National Conference of Catholic Bishops, *Letter the Gospel of Life*, (November 1998), ¶¶ 7, 25 & 30 [attached hereto as Exhibit "E"].)

TWENTY-SIXTH: Our Holy Father, Pope Francis, recently reaffirmed that abortion represents a "horrendous crime" and a "very grave sin." (cruxnow.com/Vatican, November 20, 2016. [attached hereto as Exhibit "F"]).

TWENTY-SEVENTH: By coercing the Catholic Church into violating its own core religious teachings regarding abortion, by redefining the Catholic Church wholly inconsistent with its own theology and tradition and by forcing it to be complicit in such religiously prohibited practices, the State has substantially infringed upon the right of the Church to honestly and sincerely proclaim the truth of Catholic teaching by serving as a living example. The State is forcing the Diocese of Albany and Catholic Charities,

and, consequently, the Catholic Church itself, into cooperating in the "false pluralism" rejected by the Catholic Bishops of the United States in *Living the Gospel of Life*. Indeed, because all people are called by God to live the Gospel of Life, the Church must set an example for all by doing so itself.

TWENTY-EIGHTH: It is respectfully requested that appropriate injunctive relief be granted by the Court.

s/ Terry R. LaValley
TERRY R. LaVALLEY

Sworn to before me this
21st day of December, 2016

s/ Kevin J. O'Brien
Notary Public

KEVIN J. O'BRIEN
Notary Public, State of New York
No. 4973769
Qualified in Onondaga County
Commission Expires October 29, 2018

APPENDIX H

<table>
<tr><td>STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY</td><td></td></tr>
<tr><td>THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; AND</td><td>AFFIDAVIT OF WILLIAM H. LOVE
Index No. 02070-16
RJI No. 01-1219-16
Hon. Richard J. McNally, Jr.</td></tr>
</table>

MURNANE BUILDING CONTRACTORS, INC.;
Plaintiffs,

--against--

MARIA T. VULLO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; CAPITAL DISTRICT PHYSICIANS' HEALTH PLAN, INC.; CDPHP UNIVERSAL BENEFITS, INC.; HEALTHNOW NEW YORK INC.; UNITEDHEALTH CARE OF NEW YORK, INC.; MVP HEALTH CARE, INC.; EXCELLUS HEALTH PLAN, INC.: INDEPENDENT HEALTH ASSOCIATION, INC.,
Defendants.

STATE OF NEW YORK)
COUNTY OF ALBANY)SS.:

WILLIAM H. LOVE, being duly sworn, deposes and says:

FIRST: I am the Bishop of the Episcopal Diocese of Albany, New York, ("Episcopal Diocese")

SECOND: The Trustees of the Diocese of Albany is the civil entity of the Episcopal Diocese.

THIRD: I hold a Bachelor's degree from Southwest Texas State University, a Master of Education degree from SUNY Plattsburgh, and a Master of Divinity degree from Nashotah House Episcopal Seminary.

FOURTH: I was ordained a Deacon in 1991 and to the priesthood in 1992.

FIFTH: In 2006, I was consecrated bishop and served as Bishop Coadjutor of the Episcopal Diocese of Albany. In 2007, I was installed as Bishop Diocesan of the Episcopal Diocese of Albany. I have served as Bishop of the Episcopal Diocese of Albany since that date.

SIXTH: The Episcopal Diocese of Albany was established in 1868. The geographic area of the Diocese covers 19 counties in upstate New York. It has 119 churches and ministries serving the Episcopal population of the Diocese. Within the Diocese of Albany there are 190 canonically resident priests and deacons, and six religious sisters.

SEVENTH: The Episcopal Diocese of Albany sponsors catechetical and faith formation programs throughout the Diocese.

EIGHTH: The Episcopal Diocese of Albany has over 20 employees eligible for health insurance benefits.

NINTH: The Episcopal Diocese's health insurance plan company is provided by Blue Shield Northeastern New York health plan ("BSNENY").

TENTH: The BSNENY plan for the Episcopal Diocese provides:

> **M. Interruption of Pregnancy.**
>
> **We cover therapeutic abortion; we also cover non-therapeutic abortions in case of rape, incest or fetal malformation. We cover elective abortion for one (1) procedure per member per plan year. [BSNENY Group Policy #11441814, P.43. Copy attached as Exhibit "A"]**

ELEVENTH: The Episcopal Diocese of Albany resolutely affirms the sanctity of human life as a gift from God from conception until natural death.

TWELFTH: Coerced subsidization of abortion procedures under the health insurance plan provided to the Episcopal Diocese of Albany is in direct violation of religious and moral teachings and beliefs. Cooperation in facilitating abortion services is a grave matter violating core beliefs of the Episcopal Diocese of Albany.

THIRTEENTH: It is respectfully requested that appropriate injunctive relief be granted by the Court.

s/ William H. Love
WILLIAM H. LOVE

Sworn to before me this 19th
day of December, 2016

s/ Michael L. Costello
Notary Public

MICHAEL L. COSTELLO
NOTARY PUBLIC,
STATE OF NEW YORK
Registration No. 02CO4650023
Qualified in Albany County
Commission Expires October 31, 2017

APPENDIX I

<table>
<tr><td>STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY</td><td></td></tr>
<tr><td>THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; AND</td><td>AFFIDAVIT OF SISTER ROBERT MULLEN
Index No. 02070-16
RJI No. 01-1219-16
Hon. Richard J. McNally, Jr.</td></tr>
</table>

MURNANE BUILDING
CONTRACTORS, INC.;
Plaintiffs,

--against--

MARIA T. VULLO,
SUPERINTENDENT, NEW
YORK STATE
DEPARTMENT OF
FINANCIAL SERVICES;
CAPITAL DISTRICT
PHYSICIANS' HEALTH
PLAN, INC.; CDPHP
UNIVERSAL BENEFITS,
INC.; HEALTHNOW NEW
YORK INC.;
UNITEDHEALTH CARE OF
NEW YORK, INC.; MVP
HEALTH CARE, INC.;
EXCELLUS HEALTH
PLAN, INC.:
INDEPENDENT HEALTH
ASSOCIATION, INC.,
Defendants.

STATE OF NEW YORK)
COUNTY OF ALBANY)SS.:

SISTER ROBERT MULLEN, being duly sworn, deposes and says:

FIRST: I am member of the religious order known as Carmelite Sisters for Aged and Infirmed.

SECOND: I serve as the administrator of Teresian House Nursing Home Co., Inc. ("Teresian House") located in Albany, New York.

THIRD: Teresian House provides a continuum of services to enhance the physical, spiritual

and emotional well-being of the elderly.

FOURTH: Teresian House is sponsored by and affiliated with the Roman Catholic Diocese of Albany.

FIFTH: Teresian House is operated by the Carmelite Sister for the Aged and Infirmed.

SIXTH: Teresian House is a religiously-affiliated employer whose employees are covered by Capital District Physicians Health Plan ("CDPHP").

SEVENTH: Teresian House has 450 full and part-time employees. Health insurance benefits are provided to 204 employees through the CDPHP plan.

EIGHTH: Teresian House requested that CDPHP and New York State Department of Financial Services to provide an exemption from coverage mandates involving all abortion mandates including therapeutic, non-therapeutic and elective abortions from Group Policy No. 10028081. (See attached Exhibit "A").

NINTH: This request has been refused.

TENTH: Facilitation of abortion, including coerced subsidization, represents a critical moral injury to our mission and a violation of the Ethical and Religious Directives for Catholic Health Care Services.

ELEVENTH: Mandating Teresian House to provide coverage for abortion services substantially burdens our right as a Roman Catholic employer to freely practice our sincerely-held religious beliefs in

accordance with the doctrines and teachings of the Roman Catholic Church.

TWELFTH: Providing healthcare coverage to our employees flows from the religious, moral and legal obligations we have to pay just wages.

THIRTEENTH: Withdrawing healthcare coverage from our employees would subject Teresian House and our employees to severe annual penalties.

s/ Sister Robert Mullen
Sister Robert Mullen

Sworn to before me this 19
day of December, 2016

s/ Heather M. Sheldon
Notary Public

HEATHER M. SHELDON
NOTARY PUBLIC-STATE OF NEW YORK
NO. 01SH6339278
QUALIFIED IN SCHENECTADY COUNTY
MY COMMISSION EXPIRES 03-28-2020

APPENDIX J

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; AND

AFFIDAVIT OF KEVIN PESTKE

Index No. 02070-16

RJI No. 01-1219-16

Hon. Richard J. McNally, Jr.

MURNANE BUILDING
CONTRACTORS, INC.;
Plaintiffs,

--against--

MARIA T. VULLO,
SUPERINTENDENT, NEW
YORK STATE
DEPARTMENT OF
FINANCIAL SERVICES;
CAPITAL DISTRICT
PHYSICIANS' HEALTH
PLAN, INC.; CDPHP
UNIVERSAL BENEFITS,
INC.; HEALTHNOW NEW
YORK INC.;
UNITEDHEALTH CARE OF
NEW YORK, INC.; MVP
HEALTH CARE, INC.;
EXCELLUS HEALTH
PLAN, INC.:
INDEPENDENT HEALTH
ASSOCIATION, INC.,
Defendants.

STATE OF NEW YORK)
COUNTY OF MONROE)SS.:

KEVIN PESTKE, being duly sworn, deposes and says:

FIRST: I am an ordained Baptist minister and serve as the Pastor of First Bible Baptist Church.

SECOND: First Bible Baptist Church ("First Bible") is a religious corporation duly organized and existing under the laws of the State of New York and is exempt from Federal income tax pursuant to Section 501(c)(3) of the Internal Revenue Code.

THIRD: The purpose of First Bible is to proclaim and witness the Gospel of Jesus Christ through ministries of Christian love to those who may be served.

FOURTH: First Bible's congregation is a confluence of cultural, ethnic and racial diversity constituting a family of faith which includes individuals of varied religious backgrounds.

FIFTH: Some of the programs and services offered by First Bible to the community include youth ministry, adult ministry, death ministry, education ministry, athletic activities, daycare and pre-school and mission ministry. First Bible also operates its education ministry through Northstar Christian Academy, grades K through 12 and a daycare agency.

SIXTH: First Bible currently employs over sixty people in a variety of positions. All of our employees, regardless of their religious backgrounds share First Bible's commitment to strive for a just, compassionate society that supports the dignity of individuals and families, reduce the causes and results of poverty, and build healthy communities through our many diverse, human service outreach programs. When an employee is hired and accepts an employment with First Bible, he or she clearly accepts such employment with the understanding that First Bible is a Baptist institution that conducts its operation in conformance with its Articles of Faith.

SEVENTH: First Bible offers health benefits to its eligible employees consistent with its legal obligation. Approximately thirty employees received their health insurance from First Bible. The enrolled employees of First Bible are covered under the health plan underwritten by Excellus Blue Cross/Blue Shield.

EIGHTH: Because First Bible is a Baptist organization, our policies and employment benefits must be consistent with the Articles of Faith. Our Articles of Faith teach that human life begins at conception and that the unborn child is a living human being. Furthermore, abortion constitutes the unjustified, unexcused taking of unborn human life. (*Jobe 3: 16 Psalms 51:5; 139: 14–16; Isaiah 44:24; 49:1, 5; Jeremiah 1:5; 20:15–18; Luke 1:44).*

NINTH: Because the Articles of Faith teach that abortion is contrary to the Scriptures, facilitating and subsidizing abortion procedures is unacceptable. Our health benefit plan must exclude coverage for any abortion procedures.

TENTH: I am advised that the health plan offered by Excellus includes coverage for therapeutic, non-therapeutic and elective abortions.

ELEVENTH: I am advised that discontinuing healthcare coverage for our employees would violate the legal obligation to provide benefits to our employees and would subject First Bible and its employees to substantial annual penalties.

TWELFTH: Because of these religious beliefs First Bible cannot support and facilitate coverage of abortion services through the Excellus health insurance plan which First Bible is forced to pay.

THIRTEENTH: It is respectfully requested that appropriate injunctive relief be granted by Court.

s/ Kevin Pestke
Kevin Pestke

Sworn to before me this 22nd
day of December 2016.

s/ Karen E. Reel
Notary Public

KAREN E. REEL
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01RE6089185
QUALIFIED IN MONROE COUNTY
MY COMMISSION EXPIRES MARCH 17, 2019

APPENDIX K

NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
PROPOSED
FORTY-EIGHTH AMENDMENT TO
11 NYCRR 52
(INSURANCE REGULATION 62)

MINIMUM STANDARDS FOR FORM, CONTENT AND SALE OF HEALTH INSURANCE, INCLUDING STANDARDS OF FULL AND FAIR DISCLOSURE

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301, 3201, 3217, 3221, 4235, 4237, and 4303 of the Insurance Law, do hereby promulgate the Forty-Eighth Amendment to Part 52 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation No. 62), to take effect 60 days after publication in the State Register, to read as follows:

(ALL MATERIAL IS NEW)

Subdivision 52.1(p) is added as follows:

(p)(1) Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As

a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

(2) Section 52.16(o) of this Part makes explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in this State shall not exclude coverage for medically necessary abortions. Section 52.16(o) of this Part also provides for an optional, limited exemption for religious employers and qualified religious organization employers as provided in that section while ensuring that coverage is maintained for any insured seeking a medically necessary abortion.

Subdivisions 52.2(y), (z), and (aa) are added as follows:

(y) *Religious employer* shall have the meaning set forth in Insurance Law sections 3221(l)(16)(A)(1) and 4303(cc)(1)(A).

(z) *Qualified religious organization employer* means an organization that:

(1) opposes medically necessary abortions on account of a firmly-held religious belief; and

(2)(i) is organized and operates as a nonprofit entity and holds itself out as a religious organization; or

(ii) is organized and operates as a closely held for-profit entity, as defined in subdivision (aa) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly

by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs.

(aa) *Closely held for-profit entity* means an entity that:

(1) is not a nonprofit entity;

(2) has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and

(3) has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's certification described in section 52.16(o)(2) of this Part; provided, however, that:

(i) ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries and ownership interests owned by a nonprofit entity are considered owned by a single owner;

(ii) an individual is considered to own the ownership interests owned, directly or indirectly, by or for the individual's family, provided that, for the purposes of this subdivision, "family" includes only brothers, sisters, a spouse, ancestors, and lineal descendants; and

(iii) if an individual holds an option to purchase ownership interests, then the individual is considered to be the owner of those ownership interests.

Subdivision 52.16(o) is added as follows:

(o)(1) No policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary. Coverage for abortions that are medically necessary shall not be subject to copayments, or coinsurance, or annual deductibles, unless the policy is a high deductible health plan as defined in section 223(c)(2) of the Internal Revenue Code in which case coverage for medically necessary abortions may be subject to the plan's annual deductible.

(2) Notwithstanding any other provision of this Part, a group or blanket policy that provides hospital, surgical, or medical expense coverage delivered or issued for delivery in this State to a religious employer or qualified religious organization employer may exclude coverage for medically necessary abortions only if the insurer:

(i) obtains an annual certification from the group or blanket policyholder or contract holder that the policyholder or contract holder is a religious employer or qualified religious organization employer and that it has a religious objection to coverage for medically necessary abortions; and

(ii) issues a rider to each certificate holder (i.e., primary insured) at no premium to be charged to the certificate holder (i.e., primary insured), religious employer, or qualified religious organization

employer for the rider, that provides coverage for medically necessary abortions subject to the same rules as would have been applied to the same category of treatment in the policy issued to the religious employer or qualified religious organization employer. The rider must clearly and conspicuously specify that the religious employer or qualified religious organization employer does not administer medically necessary abortion benefits, but that the insurer is issuing a rider for coverage of medically necessary abortions, and shall provide the insurer's contact information for questions.

APPENDIX L

Regulatory Impact Statement for the Proposed Forty-Eighth Amendment to 11 NYCRR 52 (Insurance Regulation 62).

1. Statutory authority: Financial Services Law ("FSL") sections 202 and 302 and Insurance Law ("IL") sections 301, 3201, 3217, 3221, 4235, 4237, and 4303.

FSL section 202 establishes the office of the Superintendent of Financial Services ("Superintendent"). FSL section 302 and IL section 301, in pertinent part, authorize the Superintendent to prescribe regulations interpreting the IL and to effectuate any power granted to the Superintendent in the IL, FSL, or any other law.

IL section 3201 subjects policy forms to the Superintendent's approval.

IL section 3217 authorizes the Superintendent to issue regulations to establish minimum standards, including standards for full and fair disclosure, for the form, content and sale of accident and health insurance policies and subscriber contracts of corporations organized under IL Article 32 and Article 43, and Public Health Law Article 44.

IL section 3221 prohibits a policy of group or blanket accident and health insurance, except as provided in IL section 3221(d), to be delivered or issued for delivery in New York unless it contains in substance the provisions set forth therein·or provisions that are in the opinion·of the Superintendent more favorable to the holders of such certificates or not less favorable to

the holders of such certificates and more favorable to policyholders.

IL section 4235 defines a group accident insurance policy, group health insurance policy, and group accident and health insurance policy.

IL section 4237 defines a blanket accident insurance policy, blanket health insurance policy, and blanket accident and health insurance policy.

IL section 4303 sets forth the benefits that every contract issued by a hospital service corporation or health service coverage must provide.

2. Legislative objectives: IL section 3217 authorizes the Superintendent to issue regulations to establish minimum standards, including standards for full and fair disclosure, for the form content and sale of accident and health insurance policies and subscriber contracts of corporations organized under IL, Article 32 and Article 43, and Public Health Law Article 44. 11 NYCRR 52 (Insurance Regulation 62) was promulgated pursuant to this section, and section 52.16(c) of Regulation 62 prohibits a policy or contract from limiting or excluding coverage by type of illness, accident, treatment, or medical condition, except in certain limited circumstances.

This amendment accords with the public policy objectives that the Legislature sought to advance in IL section 3217 by making explicit that individual, group and blanket accident insurance policies and contracts that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in New York may not exclude coverage for medically necessary abortions and must provide such coverage at no cost sharing. The amendment also provides for an

optional, limited exemption for religious employers and qualified religious organization employers (collectively, "religious employers") while ensuring that medically necessary abortion coverage is maintained for any insured of a policy issued to a religious employer at no additional cost to the insured.

3. Needs and benefits: Section 52.16(c) of Regulation 62 already prohibits a policy or contract from limiting or excluding coverage by type of illness, accident, treatment, or medical condition, except in certain limited circumstances. None of the exceptions apply to medically necessary abortions. As a result, insurance policies and contracts that provide hospital, surgical, or medical expense coverage must include coverage for medically necessary abortions. This amendment makes explicit that individual, group and blanket accident insurance policies and contracts that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in New York may not exclude coverage for medically necessary abortions and must provide such coverage at no cost sharing.

In addition, the amendment provides for an optional, limited exemption for religious employers. However, the amendment still ensures that medically necessary abortion coverage is maintained for any insured of a policy issued to a religious employer at no additional cost to the insured by requiring an insurer to issue a rider to each certificate holder of a policy issued to the religious employer that provides coverage for medically necessary abortions, at no premium to be charged to the certificate holder or religious employer.

4. Costs: Since insurers already are required to provide coverage for medical necessary abortions, insurers should not need to incur costs to file new policy or contract forms with the Superintendent. Insurers may incur costs to obtain annual certifications from religious employers that wish to exclude coverage for medically necessary abortions and to issue riders to each certificate holder at no premium to be charged to the certificate holder or religious employer under policies and contracts issued to such religious employers. However, these additional costs should be minimal.

This amendment is unlikely to impose compliance costs on the Department of Financial Services ("Department"). Any costs to the Department should be minimal and the Department expects to absorb the costs in its ordinary budget.

This amendment will not impose compliance costs on state or local governments

5. Local government mandates: This regulation does impose a new mandate on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Insurers may need to obtain annual certifications from religious employers that wish to exclude coverage for medically necessary abortions and issue riders that provide coverage for medically necessary abortions at no additional premium to each certificate holder of a policy issued to such a religious employer.

7. Duplication: This amendment does not duplicate, overlap, or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: The Department considered using a different definition of "qualified religious organization employer" but decided to use the current definition because it is more analogous to the definition in federal regulations.

9. Federal standards: The regulation does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The regulation will take effect 60 days after publication of the Notice of Adoption in the State Register.

APPENDIX M

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; TERESIAN HOUSE HOUSING

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Index No. 07536-17

RECEIVED
2017 NOV 21
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ALBANY COUNTY
CLERK

CORPORATION; DEPAUL MANAGEMENT CORPORATION; AND MURNANE BUILDING CONTRACTORS, INC.;
Plaintiffs,

--against--

MARIA T. VULLO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; AND NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES;
Defendants.

Plaintiffs, by and through their attorneys, Tobin and Dempf LLP, for their Verified Complaint, respectfully state the following:

PRELIMINARY STATEMENT

1. The State has now approved and promulgated Abortion Mandates in the form of regulations that force church institutions, employers and individuals, in violation of their religious doctrines, teachings and conscience rights, to fund and otherwise provide for that which in their own workplace they hold and teach to be gravely immoral. These Regulatory Abortion Mandates, under color of law, constitute an invidious and coercive governmental infringement on the religious freedom and liberty of conscience rights of religious institutions, employers and individuals, and,

if unchecked, will then result in even further dangerous incursions on religious freedom and liberty of conscience.

2. In this action for declaratory and injunctive relief Plaintiffs challenge, as violations of the New York State Constitution, statutes and the United States Constitution, the Regulatory Abortion Mandates of the New York State Department of Financial Services (NYSDFS) which impermissibly and unreasonably burden the religious freedom and liberty of conscience of churches, their institutions, individuals and employers to freely organize, associate or not organize or associate, express and govern themselves consistent with their religious, moral and conscience convictions. N.Y. Const. art. 1, § 3 (Free Exercise, Enjoyment of Religion and Liberty of Conscience); § 3 (Establishment Clause); § 3 (Preference Clause); § 8 (Free Speech); § 9 (Associational Liberty); art. III, § 1 (Separation of Powers); art. IV, § 8 and State Administrative Procedure Act §§ 202(1)(a), 205 (Rule Making); N.Y. Exec. Law § 296(11) (Human Rights Law); N.Y. Rel. Corp. Law § 5; U.S. Const. amend. 1 (Establishment Clause); 1 (Free Exercise of Religion); 1 (Free Speech and Association); 14 (Equal Protection); 1 (Hybrid Rights: (1) Free Exercise Clause with Free Speech; (2) Free Exercise Clause with Expressive Association and Associational Rights; (3) Free Exercise Clause with Equal Protection Clause; (4) Free Exercise Clause with Establishment Clause; (5) Free Speech with Expressive Association and Associational Rights; (6) Free Speech with Equal Protection Clause; (7) Free Speech with Establishment Clause; (8) Expressive Association and Associational Rights with Equal

Protection Clause; (9) Expressive Association and Associational Rights with Establishment Clause; and (10) Equal Protection Clause with Establishment Clause).

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by the N.Y. Const. art. 6, § 6; N.Y. Jud. Law § 140-b and N.Y. Civ. Prac. L. & R. § 301. Venue is proper in this county pursuant to N.Y. Civ. Prac. L. & R. §§ 503(a) and 505(a).

PARTIES

Plaintiffs

4. The Roman Catholic Diocese of Albany, New York ("Diocese of Albany") a special act corporation incorporated under the Laws of the State of New York, is and at all times has been a constituent part of the Roman Catholic Church and is subject to the Catechism, Canon Law and precepts of the Roman Catholic Church. Pursuant to same, the Diocese of Albany exercises ecclesiastical authority over its religious, charitable and educational ministries, institutions and parishes within fourteen counties of upstate New York. The Diocese of Albany maintains its principal administrative office in the City and County of Albany. The Diocese of Albany is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

5. The Roman Catholic Diocese of Ogdensburg ("Diocese of Ogdensburg") a special act corporation incorporated under the Laws of the State of New York, is and at all times has been a constituent part of the Roman Catholic Church and is subject to the Catechism, Canon Law, doctrines, teachings and

precepts of the Roman Catholic Church. Pursuant to the same, the Diocese of Ogdensburg exercises ecclesial authority over the religious, charitable and educational ministries, institutions and parishes within eight counties in northern New York State. The Diocese of Ogdensburg maintains its principal administrative office in Ogdensburg, New York. The Diocese of Ogdensburg is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

6. Trustees of The Diocese of Albany ("Episcopal Diocese"), a special act corporation incorporated under the laws of the State of New York is and at all times has been a constituent part of the Protestant Episcopal Church in the United States ("Episcopal Church"), and is subject to and accedes to the Constitution, Canons and General Convention of the Episcopal Church. Pursuant to same and its own Constitution and Canons, the Episcopal Diocese exercises ecclesial authority over missions, aided parishes and parishes. The Episcopal Diocese maintains its principal offices within the Counties of Albany and Washington. The Episcopal Diocese is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

7. The Sisterhood of St. Mary ("Sisters of St. Mary") an Anglican/Episcopal Order of women religious established in 1865 as a New York not-for-profit religious corporation, is and at times has been a constituent part of the Protestant Episcopal Church in the United States and is subject to and accedes to the Constitution, Canons and General Convention of the Episcopal Church. Pursuant to same, its members live a traditional, contemplative expression of monastic

life through a disciplined life of prayer set within a simple agrarian lifestyle and active ministries in their local communities. The Sisters of St. Mary maintain their principal convent in Washington County. The Sisters of St. Mary is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

8. Catholic Charities, Diocese of Brooklyn ("Charities Brooklyn") is a not-for-profit corporation established by special act of the New York State Legislature. Charities Brooklyn is operated in connection with the Roman Catholic Diocese of Brooklyn and is a vital and integral part of the human services ministry of the Roman Catholic Church. Charities Brooklyn, one of the largest multi-service agencies in the nation, provides human services programs covering the whole span of an individual's life including early childhood and family services as part of the charitable and social justice ministry of the Roman Catholic Church in Brooklyn and Queens Counties. It maintains its principal administrative office in Brooklyn. Charities Brooklyn's health insurance benefits for its employees are regulated by the NYSDFS.

9. Catholic Charities of the Diocese of Albany ("Charities Albany") is a not-for-profit corporation established by special act of the New York State Legislature. Charities Albany is operated in connection with The Roman Catholic Diocese of Albany, New York and represents the human services ministry of the Roman Catholic Church. Among its various human service programs and agencies it operates is Community Maternity Services, which offers a continuum of care for pregnant adolescents

and young parents including case management, goal-directed counseling, childbirth education, parent education, support and advocacy. Charities Albany is the means for facilitating the charitable and social justice missions of the Roman Catholic Church in fourteen counties in central and upstate New York. The work of Plaintiff Charities Albany is a vital and integral part of the human services ministry of the Roman Catholic Church. Catholic Charities of Albany maintains its principal administrative office in the City and County of Albany, State of New York. Charities Albany's health insurance benefits for its employees are regulated by the NYSDFS.

10. Catholic Charities of the Diocese of Ogdensburg ("Charities Ogdensburg") is a not-for-profit corporation established by special act of the New York State Legislature. Charities Ogdensburg is operated in connection with the Roman Catholic Diocese of Ogdensburg and is a vital and integral part of the human services ministry of the Roman Catholic Church. Charities Ogdensburg provides multiple human service programs including adoptions, maternity services and Project Rachel which provides services to individuals and families who have been involved in abortion. Charities Ogdensburg is the means for facilitating the charitable and social justice missions of the Roman Catholic Church in eight counties in northern New York State. Charities Ogdensburg maintains its principal administrative office in the Town of Oswegatchie, County of St. Lawrence. Charities Ogdensburg's health insurance benefits for its employees are regulated by the NYSDFS.

11. St. Gregory the Great Roman Catholic Church Society of Amherst, N.Y. ("St. Gregory") is a religious corporation duly organized and existing under the New York Religious Corporations Law. It serves as a parish of the Roman Catholic Diocese of Buffalo, maintains its principal place of worship in Williamsville, Town of Amherst, County of Erie and operates St. Gregory's School and several ministries. St. Gregory is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

12. First Bible Baptist Church ("First Bible") is a religious corporation duly organized and existing under the laws of the State of New York. First Bible is an independent Evangelical congregation affiliated with the Baptist Bible Fellowship International. First Bible engages in human services outreach with multiple ministries including youth ministry, adult ministry, deaf ministry, education ministry, athletic activities, day care and pre-school and mission ministry. First Bible maintains its principal place of worship in the City of Rochester, County of Monroe. First Bible is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

13. Our Savior's Lutheran Church, Albany, N.Y. ("Our Savior's Lutheran Church") is a religious corporation duly organized and existing under the New York Religious Corporations Law. It sponsors several ministries and missions and maintains its principal place of worship in the Town of Colonie, County of Albany. Our Savior's Lutheran Church is a religious employer whose health insurance benefits for its employees are regulated by the NYSDFS.

14. Teresian House Nursing Home Company, Inc. ("Teresian House") is a not-for-profit corporation organized and existing under the laws of the State of New York. Teresian House provides the elderly with a continuum of services to enhance their physical, spiritual and emotional well-being. Teresian House is sponsored by and affiliated with the Roman Catholic Diocese of Albany and operated by the religious order known as the Carmelite Sisters for the Aged and Infirm. Teresian House maintains its principal service center in the City and County of Albany. Teresian House is a religiously-affiliated employer whose health insurance benefits for its employees are regulated by the NYSDFS.

15. Renée Morgiewicz is a resident of Saratoga County. She is an employee of a religious employer, The Roman Catholic Diocese of Albany, which provides her with health insurance benefits are regulated by the NYSDFS and holds the similar beliefs of the Plaintiffs.

16. Teresian House Housing Corporation is a not-for-profit corporation organized and existing under the laws of the State of New York and operates the retirement community known as Avila ("Avila"). Avila is sponsored by and affiliated with the Roman Catholic Diocese of Albany. Avila maintains its principal office in the City and County of Albany. Avila is a religiously-affiliated employer whose health insurance benefits for its employees are regulated by the NYSDFS.

17. DePaul Management Corporation is a not-for-profit corporation organized and existing under the laws of the State of New York ("DePaul"). DePaul

manages senior living apartment communities including, Bishop Broderick Apartments, Cabrini Acres Senior Apartments, Carondelet Commons Senior Apartments, Fontbonne Manor Senior Apartments, Marie-Rose Manor, Sanderson Court Senior Apartments, St. Vincent's Apartments, Delhi Senior Community, Branson Manor Senior Apartments, St. Jude Senior Apartments, Bishop Hubbard Senior Apartments, Father Leo O'Brien Senior Community, The Lawrence Commons and Franciscan Heights Senior Community. DePaul is sponsored by and affiliated with The Roman Catholic Diocese of Albany. DePaul maintains its principal office in the City of Albany and operates in Albany, Delaware, Rensselaer, Saratoga and Schenectady Counties. DePaul is a religiously-affiliated employer whose health insurance benefits for its employees are regulated by the NYSDFS.

18. Murnane Building Contractors, Inc. ("Murnane Contractors") is a business corporation organized and existing under the laws of the State of New York. Murnane Contractors provides general construction, construction management and design/build services on public and nonpublic projects throughout New York State. Murnane Contractors maintains its principal business office in Plattsburgh, New York. Murnane is an employer whose health insurance benefits for its employees are regulated by the NYSDFS. The owner of Murnane Contractors holds fundamental religious and conscience beliefs similar to those of the co-Plaintiffs.

Defendants

19. Maria T. Vullo is the superintendent and chief executive and administrative officer of the New York State Department of Financial Services (NYSDFS) and is sued in her official capacity. Superintendent Vullo has the responsibility for the adoption, implementation and regulation of the programs, practices, directives and contracts involving health insurance policies and health insurers operating in New York State. Defendant Vullo is responsible for issuing, implementing and enforcing regulations and directives regarding health insurance contracts submitted by health insurers authorized to conduct business in New York State. Defendant Vullo's principal office and that of the New York State Department of Financial Services is in the City and County of Albany, State of New York.

20. The New York State Department of Financial Services is an executive agency of the State of New York ("NYSDFS"). The NYSDFS is the successor agency of the New York State Insurance Department and the New York State Banking Department. The NYSDFS regulates health insurance providers and health insurance benefit plan contracts issued in New York State.

THE MODEL ABORTION MANDATES AT ISSUE

21. Group and blanket health policies delivered or issued for delivery in New York State providing major medical or similar comprehensive-type coverage are regulated as to form and content by the NYSDFS (N.Y. Ins. Law §3221).

22. Health Insurance providers, including health service corporations and medical service expense indemnity corporations, are regulated by the NYSDFS with regard to policy coverages, language and benefits. (N.Y. Ins. Law §4303)

23. Previously health insurers providing group health insurance plan benefits were permitted to make discretionary decisions to issue riders to employers removing coverage for abortion benefits for employees.

24. The efforts of NYSDFS as well as its predecessor, Department of Insurance, to include abortion coverage in group health and benefit plan contracts have a history inextricably intertwined with an ongoing struggle, over the religious freedom and liberty of conscience rights of religious and religiously-affiliated employers, other employers and individuals whose conscience rights and sincerely held religious beliefs, proscribe involvement in, facilitation of or support for abortion.

25. In August, 2017, the NYSDFS finalized Abortion Mandates in the form of regulations requiring employers offering health insurance benefits to affirmatively include in their plan contracts coverage of abortions.

NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
FORTY-EIGHTH AMENDMENT TO
11 NYCRR 52
(INSURANCE REGULATION 62)

MINIMUM STANDARDS FOR FORM, CONTENT AND SALE OF HEALTH INSURANCE, INCLUDING STANDARDS OF FULL AND FAIR DISCLOSURE

Subdivision 52.1(p) is added as follows:

(p)(1) Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

(2) Section 52.16(o) of this part makes explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in this State shall not exclude coverage for medically necessary abortions. Section 52.16(o) of this Part also provides for an optional, limited exemption for religious employers as provided in that section while ensuring that coverage is maintained for any insured seeking a medically necessary abortion.

NYSDFS Forty-Eighth Amendment to 11 NYCRR 52. Copy annexed as Exhibit “A.”

26. NYSDFS on September 5, 2017, issued an Abortion Mandate in the form of "Model Language," requiring employers offering health insurance benefits, to include in their renewal contracts, coverage of "medically necessary abortions" and the availability of coverage for "elective abortions."

SECTION IX

Outpatient and Professional Services

{Drafting Note: Section IX is required for individual and small group coverage. Paragraphs F, G, H (if applicable), J, K, O, S, U(1), U(2), V and X are required for large group coverage. The remaining paragraphs are optional, although recommended if applicable, for large group coverage.}

[[M.] Interruption of Pregnancy.

We Cover medically necessary abortions including abortions in cases of rape, incest or fetal malformation. [We Cover elective abortions [for one (1) procedure per Member, per [calendar year; Plan Year].]]

{*Drafting Note: For groups that meet the religious employer definition in Sections 3221(l)(16)(A)(1) and 4303(cc)(1)(A) of the insurance Law, coverage for medically necessary abortions may be removed from the group certificate; contract; policy but must be provided by the health plan by rider, at no cost, to employees of the religious employer. With respect to elective abortions, plans must include the one procedure limit for the standard NYSOH plan and may provide coverage that is more favorable for non-standard NYSOH plans and plans offered outside the*

NYSOH. Coverage for elective abortions may be removed for any individual or group policy.}

NYSDFS Model Language Section IX [M] (September 5, 2017). Copy annexed as Exhibit "B."

27. NYSDFS in August 2017, promulgated its "Forty-Seventh Amendment to 11 NYCRR 52 (Insurance Regulation 62)" mandating "coverage of contraceptive items or services," which would include abortifacients, based on "medical necessity." Copy annexed as Exhibit "C."

28. NYSDFS in 2017 promulgated its "Forty-Ninth Amendment to 11 NYCRR 52 (Insurance Regulation 62)" mandating coverage of "abortion services." Copy annexed as Exhibit "D."

29. The Regulatory Abortion Mandates are not based on legislative policy enactment.

30. The Regulatory Abortion Mandates represent executive public policy enactments.

31. The Regulatory Abortion Mandates are internal NYSDFS policy directives.

32. The Regulatory Abortion Mandates avoided legislative oversight and deprived those affected with an opportunity to be heard because they were made by appointed, not elected, officials.

33. The Regulatory Abortion Mandates directly coerce religious employers, religiously-affiliated employers, objecting employers and individuals to fund, provide and cooperate with the religiously violative and morally offensive procedures of

therapeutic abortions[1] and non-therapeutic abortions[2]. Plaintiffs, over protest, are required to currently fund the Regulatory Abortion Mandates in their health care plans through their premiums and co-pays imposed.

34. NYSDFS mandates abortion coverage for therapeutic abortions by employers, irrespective of number of employees, under the service category of "medically necessary" surgery which is undefined.

35. The Regulatory Abortion Mandate, represented by the "Forty-Eighth Amendment, Exhibit "A", contains an unconstitutional "optional, limited exemption" for "Religious employers."

36. The penultimate version of the NYSDFS Regulatory Abortion Mandate represented by the "Forty-Eighth Amendment "contained two additional exemptions for "qualified religious organization employer" and "closely held for-profit entity." Copy annexed as Exhibit "E."

37. The Regulatory Abortion Mandates are encrypted in under the rubric of "medically necessary" surgery by NYSDFS.

38. Plaintiffs were caught unawares during the previous renewal/enrollment period, when upon objecting to earlier NYSDFS Model Language Abortion Mandates, they were informed that they had been separately covering abortions under the never

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[1] Abortion induced because of the mother's physical or mental health, or to prevent the birth of a deformed child or a child conceived as a result of rape or incest. *Stedman's Medical Dictionary*. (2002 ed.)

[2] An abortion not required for medical reasons.

disclosed service category of "medically necessary" surgery.

39. Such Undisclosed NYSDFS Abortion Mandate was issued, implemented and contractually imposed by NYSDFS without the knowledge or assent of Plaintiffs or other employers similarly situated.

40. The imposition of the previous NYSDFS Undisclosed Abortion Mandate, without any prior public or contractual notice, resulted in Plaintiffs unwittingly and currently providing for the funding of objectionable abortion coverage by the payment of premiums and co-pays, contrary to their sincerely held moral and religious beliefs against such practices. Plaintiffs then commenced an action for declaratory and injunctive relief challenging the unconstitutional imposition of the NYSDFS Model Language and Undisclosed Abortion Mandates. *The Roman Catholic Diocese of Albany, New York, et al. v. Vullo et al.* Albany County Supreme Court, Index No. 02070-16; RJI No. 01-1219-16 (Hon. Richard J. McNally, Jr.).

OBJECTION TO ABORTION FUNDING AND COVERAGE

41. Plaintiffs, on moral, ethical, conscience and religious grounds, have protested the inclusion of coverage and funding of all abortions and have demanded complete exemption for all abortion procedures in their health insurance plan contracts.

42. NYSDFS and the relevant health insurance providers have failed to provide Plaintiffs the requested exemption.

THE IMPACT OF THE ABORTION MANDATES

43. The Roman Catholic Church explicitly teaches that abortion is a "moral evil."[3] This teaching of the Roman Catholic religion is neither subordinate nor secondary. Rather, it is a fundamental instruction that is central to the Church's tenets on respect for the dignity of each member of the human family regardless of age, condition or stage of development. It is crucial to the life-affirming message of the Catholic Church.

44. The Roman Catholic Church also explicitly teaches that "[h]uman life must be respected and protected absolutely from the moment of conception" and that abortion is "gravely contrary to the moral law"[4] and an "unspeakable crime."[5] "From the time that the ovum is fertilized, a life is begun which is neither that of the father nor the mother. It is rather the life of a new human being with his own growth. It would never be made human if it were not human already. This has always been clear, and . . . modern genetic science offers clear confirmation. It has demonstrated that from the first instant there is established the program of what this living being will

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3 *The Catechism of the Catholic Church*, copyright 1997, # 2271; *Humana Vitae*, July 25, 1968 by Pope Paul VI; and *Familiaris Consortio*, November 22, 1981 by Pope John Paul II.

4 The *Catechism of the Catholic Church*, copyright 1997, # 2270, 2271.

5 *Pastoral Constitution on the Church in the Modern World Gaudium et Spes*, 51: "*Abortus necnon infanticidium nefanda sunt crimina*."

be: a person, this individual person with his characteristic aspects already well determined."[6]

45. The Episcopal Church teaches and affirms that the dignity of life must be protected from conception to natural death.[7]

46. Baptist and Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures.[8]

47. Abortion is in direct conflict with the central and explicit teachings of the Catholic, Episcopal and Evangelical faiths of the Plaintiffs. For example it is fundamental that deliberately cooperating (i.e., facilitating or otherwise participating in some meaningful way) in the provision of direct abortion constitutes a grave moral offense under Catholic teaching. In a word, no faithful Catholic person can, without violating a fundamental tenet of the Catholic religion, ever participate in, facilitate, or otherwise cooperate with the intentional killing of an unborn child. To do so, Catholics believe, violates God's creative plan for humanity and is contrary to the inherent dignity and sanctity of every human life. Therefore, the Church formally teaches that it is always objectively evil to engage in the direct and

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[6] Congregation of the Doctrine of Faith, *Declaration on Procured Abortion* (18 November 1974), NOS. 12–13: AAS 66 (1974), 738.

[7] Episcopal Diocese 2007 Annual Convention Resolution 4. "Resolved, that the 2007 Convention of the Diocese of Albany affirms the sanctity of human life as a gift of God from conception to natural death."

[8] *Jeremiah* 1:4; *Luke* 1:39.

intentional killing of unborn human life or any other innocent human life. Direct abortion is clearly and unequivocally immoral and unacceptable in every circumstance. Plaintiffs will not, and cannot, accept or facilitate it in any way. Yet Plaintiffs have been coercively and unwillingly made part of said evil through the Abortion Mandates represented and actualized by the aforementioned NYSDFS regulations.

48. Plaintiffs and other religions also teach that an employer has a moral obligation at all times to consider the well-being of its employees and to offer just wages and benefits in order to provide a dignified livelihood for the employee and his or her family. In accordance with religious teaching, religious employers view the offering of fair, adequate and just employment benefits as a moral obligation rooted in the Gospel of Jesus Christ. The scope and range of these benefits, however, must also be consistent with religious and moral teaching on the dignity and sanctity of each member of the human family.

49. As a result of the clear and unequivocal religious and moral teaching against abortion, the notion of a church institution providing its employees, regardless of their particular religious affiliation, with health insurance coverage for abortion, is morally unacceptable as a matter of religious teaching and moral conviction. To provide such insurance coverage to the employees of church organizations and agencies would provide the occasion for "grave sin," which the Roman Catholic Church and other religions cannot religiously or morally accept or sanction. The NYSDFS Regulatory Abortion Mandates constitute a direct and an unreasonable interference with the

exercise of religion by Plaintiffs, who therefore warrant a complete exemption from same.

50. The NYSDFS Regulatory Abortion Mandates were promulgated with the explicit intention of exempting some employers, while, at the same time, excluding other employers from the exemption.

51. Plaintiffs, having no alternative, are enrolled in health care plans that cover direct abortion for all plan participants. As a result, Plaintiffs have been coerced into paying premiums for such coverage, all the while lacking any actual or constructive notice of such finding. Plaintiffs, given their moral and religious objections to the practice of direct abortion, are being coerced to pay premiums to fund the direct abortion of the unborn children of plan participants. This situation is morally, ethically, and religiously unacceptable to Plaintiffs as it substantially burdens and unreasonably interferes with their religious and conscience rights.

52. Plaintiffs believe that health care is a right, not a privilege, of all persons. The provision of health care coverage by Plaintiffs must, however, comport with their moral teachings, especially on the right to life of all human beings which is itself the foundation for a right to health care. In this case, their own health care plans do not so comport and their inability to change this is a direct result of NYSDFS's unlawful Regulatory Abortion Mandates. These regulatory mandates have deprived them, along with millions of other New Yorkers who have moral, conscience and/or religious objections to abortions, of the ability to purchase or provide health care plans that do not violate their own sincerely held, fundamentally

important moral, religious and conscience beliefs. Simply stated, the Plaintiffs cannot, in conscience, fund direct abortions through their own health plan's insurance premiums.

53. In approving and promulgating the Regulatory Abortion Mandates, and unlawfully usurping the authority of the New York State Legislature, NYSDFS denied the Plaintiffs, along with millions of other New Yorkers who have moral, religious or conscience objections to abortion, their right as citizens to comment publicly on the merits of the Abortion Mandates before the Legislature, thereby circumventing constitutional and statutory exemptions or accommodations for citizens who have deeply held moral or religious objections to paying for coverage of abortion.

54. Plaintiffs' group health plans come up for renewal in December 2017, and thereafter.

UNLAWFUL ABORTION MANDATES

55. The NYSDFS Regulatory Abortion Mandates violate the Hyde/Weldon Conscience Protection Amendment, which protects physicians, nurses, hospitals, health insurance companies, health insurance plans or any other kind of health care facility, organization, or plan from being forced by state governments receiving federal health funds to perform, pay for, provide coverage of, or refer for abortions. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H. tit. V, § 507(d) (Dec. 18, 2015). The Weldon Amendment provides that states receiving federal funds may not discriminate against health plans based on their decision not to cover or pay for abortions.

56. The NYSDFS Regulatory Abortion Mandates violate the New York State Constitution protections of religious liberty and constitute an unlawful usurpation of legislative power by an administrative agency in violation of the separation of powers doctrine.

DECLARATORY AND INJUNCTIVE RELIEF

57. The Regulatory Abortion Mandates imposed on Plaintiffs through their health plans are enforceable against their health insurance providers by the Defendant Maria T. Vullo, in her capacity of superintendent of the New York State Department of Financial Services.

58. If this Court were to enjoin the enforcement of coverage and funding of the Regulatory Abortion Mandates declare the Abortion Mandates, including their coverage and funding to be unconstitutional, Plaintiffs' health insurers could provide Plaintiffs with group health benefit plans that offer Plaintiffs and their employees benefits consistent with the teachings of their church and in compliance with Plaintiffs' moral, conscience and religious convictions.

59. Defendants have no compelling interest in unilaterally mandating abortion insurance coverage and funding for the employees of religious employers, religiously-affiliated employers, other employers and individual employees that outweigh Plaintiffs' constitutional and conscience rights.

60. Because the NYSDFS deemed it necessary to include an optional, limited exemption from the Model Language Abortion Mandates, NYSDFS already has determined that the interests advanced by the Regulatory Abortion Mandates are not so compelling

or of such a high order or that the means used are not the least restrictive that they cannot yield to accommodate conflicting interests or rights. Moreover, it is beyond question that an accommodation is possible and readily accomplished and extended to similarly situated employers, i.e. others are being accommodated by the laws and regulations, as evidenced by the penultimate version of the NYSDFS "Forty-Eight Amendment." See Exhibit "E."

61. The regulatory Abortion Mandates are not narrowly tailored to advance any compelling governmental interest insofar as they were drafted to intentionally coerce certain religious organizations and employers, including, specifically, religious organizations with health care and human service agencies, to fund and provide coverage of abortion services to their employees.

62. Plaintiffs have sustained and continue to sustain actual harm and injury by funding the NYSDFS Regulatory Abortion Mandates through premiums and co-pays. An actual, present controversy has arisen regarding whether the approval, promulgation, implementation, enforcement and funding of the Regulatory Abortion Mandates are unconstitutional and violate Plaintiffs' constitutional and statutory rights.

63. This actual and present controversy is properly the subject of declaratory relief insofar as Plaintiffs seek a declaration of their rights, and the constitutional and statutory invalidity of the NYSDFS's Regulatory Abortion Mandates, and the coerced funding of same. If the NYSDFS's Regulatory

Abortion Mandates are adjudged to violate the provisions of the New York Constitution, New York statutes or the United States Constitution or statutes, Plaintiffs will be permitted to renew and continue their existing group health benefits plans in the present form which do not include abortion insurance coverage, as such coverage is contrary to Plaintiffs' sincerely held religious beliefs as well as moral and conscience objections.

64. Plaintiffs seek entry of a judgment, pursuant to Civil Practice Law and Rule §3001, declaring that the NYSDFS Regulatory Abortion Mandate and the Model Language Abortion Mandate covering and funding "therapeutic" and "non-therapeutic" abortions, under the service category "medically necessary" surgery, and the pertinent abortion coverage and funding provisions included in the health insurance contracts approved and issued by Defendants dealing with coerced abortion coverage and funding, violate the New York Constitution, New York statutes and the United States Constitution, and are thus inoperative.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK STATE CONSTITUTION FREE EXERCISE, ENJOYMENT OF RELIGION & LIBERTY OF CONSCIENCE GUARANTEES (NEW YORK CONSTITUTION, ARTICLE 1, SECTION 3)

65. Plaintiffs repeat and reallege paragraphs "1" through "64" of the verified complaint and incorporate same herein as though more fully set forth.

66. The NYSDFS Regulatory Abortion Mandates and Model Language, Sec. IX [M], those portions of health insurance contracts covering abortions under the service category of "medically necessary" surgery, impose a severe, direct and substantial burden, and have unreasonably interfered with an infringed upon Plaintiffs' guaranteed right to the free exercise and enjoyment of religion and liberty of conscience, under Article I, Section 3 of the New York Constitution.

67. Mandating that Plaintiffs and objecting employers provide their employees with funded abortion coverage is in violation of their sincerely held religious, moral, and conscience beliefs, which are integral to the mission of their representative church organizations and therefore infringes upon their guaranteed right to the free exercise and enjoyment of religion and liberty of conscience under Article 1, Section 3 of the New York Constitution.

68. The NYSDFS Regulatory Abortion Mandates coerce Plaintiffs into choosing between violating their sincerely held religious beliefs regarding the moral impermissibility of abortion and violating their sincerely held religious and conscience beliefs regarding the moral obligation of employers to provide a dignified livelihood, including fair, adequate and just employment benefits, to their employees. Neither choice is religiously nor morally acceptable to Plaintiffs, as either option coerces Plaintiffs into either violating their sincerely held religious and conscience beliefs or facing draconian financial penalties. Consequently, the NYSDFS Regulatory Abortion Mandates, including those portions of policies requiring coverage of the Undisclosed Abortion Mandate under the service category of "medically necessary" surgery are unconstitutional and have the coercive effect of operating against Plaintiffs in the practice of their religion and, thus, violate their religious freedom, enjoyment of religion, and liberty of conscience guarantees under Article I, Section 3 of the New York Constitution.

SECOND CAUSE OF ACTION

DECLARATORY RELIEF INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK STATE CONSTITUTION ESTABLISHMENT CLAUSE (NEW YORK CONSTITUTION, ARTICLE 1, SECTION 3)

69. Plaintiffs repeat and reallege paragraphs "1" through "68" of verified complaint and incorporate same herein as more fully set forth.

70. The NYSDFS Regulatory Abortion Mandates, Model Language, Sec. IX [M], those portions of health insurance contracts requiring coverage of abortions under the service category of "medically necessary" surgery, violate the Establishment Clause of Article I, Section 3 of the New York Constitution.

71. In issuing the Regulatory Abortion Mandates NYSDFS chose to selectively impose a substantial burden upon particular religious employers, religiously-affiliated organizations and individuals while preferring other large group employers through the grant of an optional exemption from its Model Language.

72. NYSDFS understood that the Regulatory Abortion Mandates would be imposed upon certain religiously-affiliated organizations despite their well-known religious objections to abortion, while exempting other large group organizations only from the Model Language Abortion Mandate.

73. Upon information and belief, NYSDFS deliberately undertook efforts to carve up religious

employers and religiously-affiliated organizations into discrete segments. The distinctions draw by the NYSDFS are wholly contrary to religious teachings, which regard the latter activities of the Plaintiffs as vital parts of their mission and ministries.

74. The principal effect of excluding some religious employers and religiously-affiliated organizations from the Regulatory Abortion Mandates exemption is to selectively impose the Regulatory Abortion Mandates on some religious organizations but not on others. The deliberate distinctions drawn by the optional exemption provision involving religious organizations, and the resultant denominational preferences that flow therefrom, violate the Establishment Clause of Article I, Section 3 of the New York Constitution.

75. The NYSDFS Regulatory Abortion Mandates, Model Language, Sec. IX [M] and those portions of health policies requiring coverage of the Abortion Mandate under the service category of "medically necessary" surgery are unconstitutional and impose a severe and direct burden upon Plaintiffs' constitutionally guaranteed rights under the Establishment Clause of Article I, Section 3 of the New York Constitution.

THIRD CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK STATE CONSTITUTION PREFERENCE CLAUSE (NEW YORK CONSTITUTION, ARTICLE 1, SECTION 3)

76. Plaintiffs repeat and reallege paragraphs "1" through "75" of the verified complaint and incorporate same herein as though more fully set forth.

77. The NYSDFS Regulatory Abortion Mandates, Model Language, Sec. IX [M], and those portions of health insurance contracts requiring coverage of the Abortion Mandates under the service category of "medically necessary" surgery, violate the Preference Clause of Article I, Section 3 of the New York Constitution.

78. The NYSDFS Regulatory Abortion Mandates and their various iterations draw explicit and deliberate distinctions between different religiously-affiliated organizations for the purpose of exempting certain religious organizations, and excluding others from exemptions.

79. The benefit conferred by the optional exemption for certain employers constitutes an advantage while the burden of compliance with the Regulatory Abortion Mandates for others is not *de minimis*, but rather a draconian financial penalty which, upon information and belief, would easily run into the tens or hundreds of millions of dollars for the Plaintiffs

80. Plaintiffs' religious freedom and liberty of conscience have been threatened because NYSDFS has drawn a line and associated its power with certain religiously-affiliated organizations and religious traditions to the deliberate exclusion of other religiously-affiliated organizations and religious traditions, under the Regulatory Abortion Mandates and the inclusion of all employers under the Undisclosed Abortion Mandate.

81. By exempting some religiously-affiliated organizations and other employers from the Regulatory Abortion Mandates, while coercing other organizations to comply, the NYSDFS has bestowed a differential benefit on some organizations and employers. The NYSDFS has consequently granted the exempt employers a constitutionally forbidden "preference."

82. The broad protections guaranteed by the Preference Clause of Article I, Section 3 of the New York Constitution prevents the NYSDFS from discriminating between, or conferring any advantage upon, particular religiously-affiliated organizations and employers or a particular religious denomination. Consequently, the optional exemption to the prescription of the Abortion Mandates, set forth in NYSDFS Model Language Sec. IX [M], and those portions of health insurance contracts requiring coverage of the Abortion Mandates under the service category of "medically necessary" surgery, violate the Preference Clause of Article I, Section 3 of the New York Constitution.

FOURTH CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK STATE CONSTITUTION - FREE SPEECH (NEW YORK CONSTITUTION, ARTICLE 1, §8)

83. Plaintiffs repeat and reallege paragraphs "1" through "82" of the verified complaint and incorporate same herein as though more fully set forth.

84. The NYSDFS Regulatory Abortion Mandates have infringed Plaintiffs' rights under the Free Speech provisions of Article 1, Section 8 of the New York Constitution.

85. Plaintiffs enjoy a guaranteed right under Article 1, Section 8 to promote their religion-based missional goals, purposes and conscience. Plaintiffs, through implementation of operational policies consistent with the religious and moral teachings on the dignity of life and abortion, have made a powerful statement, both symbolically and literally, through publication of their employee policy and procedure manuals, governance and operations regarding the relevance and importance of their religious teachings and traditions in conducting their activities and in the daily lives of their employees. Plaintiffs' implementation of employee policies and procedures is based upon religious and moral teachings and traditions and constitute an important component of Plaintiffs' efforts to actualize their religious beliefs and conscience principles by demonstrating a serious and earnest commitment to the values of the Gospel and religious teachings in the conduct of their missional affairs and activities.

86. Plaintiffs possess a concomitant right under Article 1, Section 8 of the New York Constitution to decline to foster concepts inimical to their beliefs and conscience. The Abortion Mandates imposed upon Plaintiffs by NYSDFS compel Plaintiffs and all other affected religious and religiously-affiliated employers, individuals and employers to foster concepts contrary to their profoundly important and sincerely held religious beliefs and moral convictions.

87. By requiring those Plaintiffs who support and provide maternity services, abortion counseling and adoption to include and fund abortion coverage and, consequently, provide information to employees regarding such insurance coverage, the Abortion Mandates coerce Plaintiffs to, both symbolically and literally, make a public statement regarding abortion contrary to their sincerely held religious beliefs and conscience rights and thus foster a concept wholly and profoundly inimical to such beliefs and rights.

88. Catholic Plaintiffs, whose religious beliefs teach that abortion is a "moral evil" and "gravely sinful" are forced by NYSDFS Regulatory Abortion Mandates to offer and fund abortion coverage as a "benefit of employment." Episcopal, Baptist, Lutheran, individual, and employer Plaintiffs, whose religious and moral beliefs hold that abortion is immoral, are forced to offer and fund same as a "benefit of employment." By offering access to abortion as a "benefit" of employment, Plaintiffs are compelled to choose between the moral requirement for providing fair and just employment benefits, such as health care insurance and the moral impermissibility of facilitating access to abortion, which Plaintiffs' religious and conscience beliefs consider immoral. The

symbolic impact of a religious and religiously-affiliated employer offering and funding such abortion insurance coverage to its employees is a considerable burden and deleterious to Plaintiffs' rights, under Article 1, Section 8 of the New York Constitution: rights to proclaim religious and moral teachings by way of example in the manner in which they conduct their own activities, and to serve as a witness to the life-affirming message of the Gospel of Jesus Christ and their religious traditions.

89. The NYSDFS Regulatory Abortion Mandates force Plaintiffs to become an instrument for fostering public adherence to a public policy promoting the practice of abortion, a principle which Plaintiffs find morally, religiously and profoundly unacceptable. In doing so, the NYSDFS has invaded the sphere of protection of the liberty of speech, which is the purpose of Article 1, Section 8 to reserve from all official control.

90. The Regulatory Abortion Mandates imposed and implemented by the NYSDFS are unconstitutional and impose a direct and severe burden upon Plaintiffs' constitutionally guaranteed right to free speech pursuant to the Free Speech provisions of Article 1, Section 8 of the New York Constitution.

FIFTH CAUSE OF ACTION

DECLARATORY RELIEF INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK STATE CONSTITUTION ASSOCIATIONAL LIBERTY (NEW YORK CONSTITUTION, ARTICLE 1, § 9)

91. Plaintiffs repeat and reallege paragraphs "1" through "90" of the verified complaint and incorporate same herein as though more fully set forth.

92. The NYSDFS Regulatory Abortion Mandates have infringed Plaintiffs' expressive association rights and violate Article 1, Section 9 of the New York Constitution.

93. By requiring Plaintiffs to fund and cover abortion and consequently provide information to their employees regarding such insurance coverage, the Regulatory Abortion Mandates coerce Plaintiffs to, both symbolically and literally, make a public statement and engage in expressive conduct regarding abortion which is profoundly contrary to their sincerely held religious, moral and conscience beliefs and, thus, foster a concept wholly inimical to such religious, moral and conscience beliefs.

94. Mandating such insurance coverage requires Plaintiffs to speak, orally and in writing, regarding the availability of abortion, as a benefit of employment by Plaintiffs.

95. The NYSDFS Regulatory Abortion Mandates force Plaintiffs, as part of their ordinary missional and employment activities, to become part of an association or an instrument for fostering public

adherence to a public policy promoting the practice of abortion, a principle which Plaintiffs profoundly find morally and religiously impermissible. The Regulatory Abortion Mandates are unconstitutional and violate Plaintiffs' rights of expressive association.

SIXTH CAUSE OF ACTION

DECLARATORY RELIEF INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK STATE CONSTITUTION SEPARATION OF POWER AND RULE MAKING (NEW YORK CONSTITUTION, ARTICLE III, § 1, IV, § 8)

96. Plaintiffs repeat and realleges paragraphs "1" through "95" of the verified complaint and incorporate same herein as though more fully set forth.

97. The NYSDFS Regulatory Abortion Mandates violate the separation of powers doctrine and rule making provisions of Article III, § 1, and Article IV, § 8 of the New York State Constitution and § 202(1)(a) of the State Administrative Procedure Act ("SAP A"). Plaintiffs in compliance with SAPA § 205 timely filed verified petition with the NYSDFS requesting the invalidation of the Regulatory Abortion Mandates. The NYSDFS refused to provide the relief requested.

98. The NYSDFS has historically secured health insurance coverage and expansion through legislation and by issuing and implementing the subject Regulatory Abortion Mandates unlawfully usurped the legislative powers of the New York State Legislature, circumvented constitutional and statutory rule and regulation requirements, thereby

depriving the public and Plaintiffs the opportunity and right to be heard.

SEVENTH CAUSE OF ACTION

DECLARATORY RELIEF INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE NEW YORK HUMAN RIGHTS LAW (HUMAN RIGHTS LAW, EXECUTIVE LAW §296(11))

99. Plaintiffs repeat and reallege paragraphs "1" through "98" of the verified complaint and incorporate same herein as though more fully set forth.

100. The provision by a New York employer of a group or blanket health policy providing hospital, surgical or medical coverage to employees constitutes a benefit to such employees which affects the terms, conditions or privileges of employment.

101. The Legislature by enacting the Human Rights Law has pre-empted the area of the employer-employee relationship by previously exempting religious employers from taking any action which would violate their sincerely held religious beliefs within the employer-employee relationship dealing with the terms, conditions and privileges thereof:

> Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or

> denomination *or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained*, (N.Y. Exec. Law §296(11) (emphasis added).

102. Plaintiffs are operated, supervised or controlled by or in connection with a religious organization and accordingly are qualified religious employers.

103. The Regulatory Abortion Mandates imposed by NYSDFS violate Plaintiffs' sincerely held religious beliefs, their right to religious freedom and liberty of conscience, and the Human Rights Law.

104. Plaintiffs as religious employers enjoy a statutory conscience right which protects them from being coerced into providing employment benefits consisting of abortion coverage, contrary to their sincerely held religious and moral beliefs.

EIGHTH CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE RELIGIOUS CORPORATIONS LAW
(RELIGIOUS CORPORATIONS LAW §§26, 5)

105. Plaintiffs repeat and reallege paragraphs "1" through "104" of the verified complaint and incorporate same herein as though more fully set forth.

106. The Legislature by enacting the Religious Corporations Law addressed the relationship between the law and religion by codifying an allowance of the greatest and freest scope to the activities and practices of religious organizations.

107. The Legislature by enacting the Religious Corporations Law did not define religion, rather it explicitly subordinated the statute to the "laws, regulations, practices, disciplines, rules and usages" of religious denominations and ecclesiastical governing bodies.

108. The Regulatory Abortion Mandates imposed by NYSDFS impermissibly define religion and contravene the sphere of legal regulation of religious organizations, by drawing distinctions between those who received exemptions and those who did not.

109. The NYSDFS Regulatory Abortion Mandates abrogate the statutory protections safeguarded to religious organizations under the law in New York and violate Plaintiffs' sincerely held religious beliefs and their rights to religious freedom and liberty of conscience.

NINTH CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION - ESTABLISHMENT CLAUSE
(U.S. CONSTITUTION, AMENDMENT 1)

110. Plaintiffs repeat and reallege paragraphs "1" through "109" of the verified complaint and incorporate same herein as though more fully set forth.

111. The NYSDFS Regulatory Abortion Mandates violate the Establishment Clause of the First Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment.

112. Upon information and belief, the NYSDFS Abortion Mandates were originally issued with the express intention of including some religious organizations while, at the same time, optionally excluding other religious organizations, specifically health care organizations, human service agencies, schools and universities.

113. The NYSDFS has engaged in constitutionally impermissible "religious gerrymandering," in violation of the First Amendment to the Constitution of the United States, by arbitrarily granting an exemption for some religious organizations and denying the exemption for others.

114. The NYSDFS intended to impose the abortion insurance coverage Regulatory Abortion Mandates upon certain religious organizations, despite their

well-known religious objection to abortion, while exempting other religious organizations from the Regulatory Abortion Mandates.

115. The NYSDFS undertook efforts to carve up religious and religiously-affiliated organizations into discrete segments. The distinctions drawn by the NYSDFS between religious organizations engaging in purportedly "religious activities," based on their size are wholly contrary to religious teaching, which regards the activities of religious organizations, such as the Plaintiffs, as vital and integral ministries irrespective of the size of their employee payroll.

116. The issue as to whether the Regulatory Abortion Mandates exemption should be optionally extended to include specific religious organizations led the NYSDFS to discuss the characteristics of a particular denomination and its constituent organizations, with a view towards "religious gerrymandering."

117. The NYSDFS Regulatory Abortion Mandates are not facially neutral statutory provisions, which coincidentally have a "disparate impact" upon different religious organizations. Rather, the NYSDFS Regulatory Abortion Mandates draw explicit and deliberate distinctions among religious organizations for the purpose of targeting certain religious organizations and excluding significant numbers of other organizations from the Regulatory Abortion Mandates as an optional exemption.

118. The NYSDFS provides the exemption provision to distinguish between churches and religiously-affiliated employers for purposes of granting relief from the imposition of the Regulatory

Abortion Mandates. The principal effect of excluding some religious employers from the Regulatory Abortion Mandates exemption is to selectively impose the Regulatory Abortion Mandates on some religious organizations but not on others.

119. The benefit conferred by exemption included in the NYSDFS Regulatory Abortion Mandates may constitute an advantage for those religious organizations that are exempt, while imposing a burden, which is not *de minimis*, on those religious organizations, including Plaintiffs, which are not exempt.

TENTH CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION-FREE EXERCISE CLAUSE (U.S. CONSTITUTION, AMENDMENT 1)

120. Plaintiffs repeat and reallege paragraphs "1" through "119" of the verified complaint and incorporate same herein as though more fully set forth.

121. NYSDFS's decision to exclude certain religious organizations but not others from the Regulatory Abortion Mandates demonstrates intentional targeting of the religious beliefs of certain religiously-affiliated organizations, regarding the religiously-based prohibition against abortion in violation of the Free Exercise Clause of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment.

122. Upon information and belief the purpose for the exclusion of certain religious organizations and employers was to infringe upon, and restrict the practices of, said organizations' religious freedom and conscience rights pertaining to their offering insurance coverage to their employees consistent with their moral beliefs. The NYSDFS Regulatory Abortion Mandates are not neutral and are invalid under the Free Exercise Clause of the First Amendment to the United States Constitution.

123. The NYSDFS Abortion Mandates impose a direct, extraordinary, substantial and unreasonable burden on the religious freedom and conscience rights of the Plaintiffs.

124. Upon information and belief, the NYSDFS's refusal to extend the exemption to all religious organizations, as a whole, is the product of discriminatory intent on the part of the NYSDFS against churches and their constituent religious organizations including, but not limited to, the Plaintiffs.

125. By allowing an optional exemption for certain group employers from the Regulatory Abortion Mandates, NYSDFS acknowledged that the State's interest in enforcement was not paramount in order to advance the State's interest. Because NYSDFS determined that the State's interests must yield to accommodate the religious beliefs of certain religious employers, NYSDFS was required to uniformly extend the exemption to relieve the extraordinary burden imposed upon all religious organizations, as the NYSDFS originally intended in the penultimate version of the Forty-Eighth Amendment.

126. The NYSDFS has engaged in constitutionally impermissible "religious gerrymandering" in violation of the First Amendment to the United States Constitution, granting selective exemption to some employers and denying the exemption for others.

127. The NYSDFS Regulatory Abortion Mandates, which are not grounded in statute or regulation, are not "generally applicable" or "neutral," because through their design, interpretation and enforcement, they target the practices of certain religious employers for discriminatory treatment.

ELEVENTH CAUSE OF ACTION

DECLARATORY RELIEF INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION-FREE SPEECH AND ASSOCIATION (U.S. CONSTITUTION, AMENDMENT 1)

128. Plaintiffs repeat and reallege paragraphs "1" through "127" of the verified complaint and incorporate same herein as though more fully set forth.

129. The NYSDFS Regulatory Abortion Mandates infringe Plaintiffs' rights under the Free Speech and Expressive Association guarantees of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment.

130. Plaintiffs, as church institutions, employers and individuals enjoy a First Amendment right to evangelize and to promote their mission. Plaintiffs' implementation of employee policies and procedures, which reflect and are based upon religious teachings,

ethics and conscience, constitute a critical component of Plaintiffs' constitutionally protected right to promote their missions and operations by Plaintiffs demonstrating their serious and earnest commitment to living the values of the Gospel and church teachings on morals and ethics in the conduct of Plaintiffs' missional and employment activities. Even if some of Plaintiffs' employees do not share the tenets of the organization, they have accepted its mission by continuing in its employ.

131. By implementing employee policies consistent with religious teachings such as the Ethical and Religious Directives for Catholic Health Care Services, Plaintiffs have made a powerful statement and implementation of expressive conduct, both symbolically and literally, through publication of their employee policy and procedure manual materials regarding the relevance and importance of religious teachings in conducting their business and in the daily lives of their employees.

132. Plaintiffs possess a concomitant right, under the First Amendment, to decline to foster concepts inimical to their beliefs. The Regulatory Abortion Mandates imposed on Plaintiffs compel Plaintiffs, and all other affected religious organizations, employers and individuals to forcibly adopt concepts and speech and association with those who hold views wholly contrary to their profoundly important and sincerely held religious and moral beliefs, thus violating the constitutional guarantees of free speech and expressive association.

133. By requiring Plaintiffs to provide and fund insurance coverage for abortion and provide

information to their employees regarding such insurance coverage, the Abortion Mandates coerce Plaintiffs to, both symbolically and literally, make a public statement and engage in expressive conduct regarding abortion contrary to their sincerely held religious and moral beliefs and, thus, foster a concept and association wholly inimical to such beliefs.

134. Catholic Plaintiffs, whose religious beliefs teach that abortion is a "moral evil" and "gravely sinful," are forced to offer and fund abortion coverage as a "benefit" of employment. Episcopal, Baptist and Lutheran Plaintiffs, whose religious beliefs hold that abortion is immoral, are forced to offer same as a "benefit of employment." The symbolic value of a religious and religiously-affiliated employer offering such abortion insurance coverage to their employees is a considerable burden and deleterious to Plaintiffs' right, under the First Amendment, to proclaim religious and moral teachings by way of expressive conduct including the way they actualize their own missional activities and thus serve as living witness to the life-affirming message of the Gospel of Jesus Christ. NYSDFS requires Plaintiffs to foster associations that are contradictory to their associational mission and message and wholly inimical to their institutional religious and moral beliefs.

135. Mandating such insurance coverage also necessarily requires Plaintiffs to speak, orally and in writing, regarding the availability of abortion as a benefit of employment provided by Plaintiffs. Plaintiffs must provide their employees with information regarding available insurance coverage and, thus, must necessarily inform those employees

that they are entitled to receive insurance coverage for abortion as a benefit of being employed by Plaintiffs.

136. The NYSDFS Regulatory Abortion Mandates force Plaintiffs, as part of their ordinary missional and employment activities, to become an instrument of the State for publicly promoting the practice of abortion, a principle which Plaintiffs profoundly find morally and religiously impermissible. In doing so, the NYSDFS has invaded the sphere of protection of liberty of speech, including the right not to speak, which is a violation of the purpose of the First Amendment to reserve incursions from all official control.

137. The NYSDFS Regulatory Abortion Mandates impose a direct and severe burden upon Plaintiffs' constitutionally guaranteed right to free speech, expressive association, and associational liberty and violate the First Amendment to the United States Constitution.

TWELFTH CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION-EQUAL PROTECTION
(U.S. CONSTITUTION, AMENDMENT 14)

138. Plaintiffs repeat and reallege paragraphs "1" through "137" of the verified complaint and incorporate same herein as though more fully set forth.

139. Because the NYSDFS Regulatory Abortion Mandates make an impermissible classification among employers based upon the exercise of

fundamental religious rights, specifically the constitutionally protected right to free exercise of religion and to be free of denominational preferences, NYSDFS and their Abortion Mandates violate the Equal Protection Clause contained in the Fourteenth Amendment of the United States Constitution.

140. Upon information and belief, the classifications imposed by the Model Language Abortion Mandates exemption provision was motivated by discriminatory animus against certain religiously-affiliated organizations and their views on the religious and moral impermissibility of abortion. The basis for the distinctions drawn by the NYSDFS Regulatory Abortion Mandates is religious not secular. It inherently treats similarly situated individuals and organizations differently based solely on religious viewpoint.

141. The classification drawn by the NYSDFS Regulatory Abortion Mandates substantially burden Plaintiffs' fundamental religious freedom and conscience rights. Upon information and belief, other similarly situated employers and individuals received exemptions and Plaintiffs were not granted same. The NYSDFS classification scheme is unconstitutional due to its being entirely unilateral and facially discriminatory against certain religious beliefs or institutions.

142. The Regulatory Abortion Mandates optional exemption provision impermissibly draws arbitrary classifications among and between religious employers. The suspect classification is based upon specified criteria intentionally tailored to target distinct institutions, largely religious based (i.e.

similarly situated persons as Plaintiffs, who received exemptions that were then denied to Plaintiffs).

143. Upon information and belief, the classifications set forth in the NYSDFS Regulatory Abortion Mandates are intentionally drawn to specifically burden religious employers insofar as their denominations are the only religious denomination that operate health care facilities, universities and human services agencies in New York on a statewide scale and have a religious proscription against the practice of abortion. Upon information and belief, because certain denominations hold strong religious views in reference to the prohibition against abortion, their religious freedom rights are substantially burdened by the suspect classifications built into the Abortion Mandates' directives.

144. Upon information and belief, the distinctions were drawn to impact specific religious, and denominations with strong, well-publicized religious teachings against the use of abortion, *viz*., the Roman Catholic Church, Episcopal Church, Baptist Church and Lutheran Church. NYSDFS "gerrymandered" certain denominations by way of separating them into distinct segments through the use of an unconstitutional classification scheme and thereby imposing a severe burden upon Plaintiffs' religious freedom rights.

THIRTEENTH CAUSE OF ACTION

DECLARATORY RELIEF
INVALIDITY OF NYSDFS REGULATORY ABORTION MANDATES UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION-HYBRID RIGHTS
(U.S. CONSTITUTION, AMENDMENT 1)

145. Plaintiffs repeat and reallege paragraphs “1” through “144” of the verified complaint and incorporate same herein as though more fully set forth.

146. Plaintiffs hereby assert “hybrid rights” claims, with respect to the NYSDFS Regulatory Abortion Mandates dealing with abortion, based upon the substantial infringement of Plaintiffs’ rights under the Free Exercise Clause of the First Amendment, in conjunction with other constitutional protections, including, Plaintiffs’ rights under the provisions of the First Amendment: (1) Free Speech; (2) Expressive Association and Associational Rights; (3) Equal Protection Clause; (4) Establishment Clause; Plaintiffs’ rights under the Free Speech provisions of the First Amendment in conjunction with: (5) Expressive Association and Associational Rights; (6) Equal Protection Clause; (7) Establishment Clause; Plaintiffs’ rights under the Expressive Association and Associational Rights provisions of the First Amendment in conjunction with: (8) Equal Protection Clause; (9) Establishment Clause; and Plaintiffs’ rights under the Equal Protection Clause in conjunction with: (10) Establishment Clause.

147. For the reasons set forth above at paragraphs 110–119, 120–127, 128–137, 138–144, Plaintiffs' rights under the First Amendment, Free Exercise Clause, in conjunction with the Constitutional provisions of (1) Free Speech; (2) Expressive Association and Associational Rights; (3) Equal Protection Clause; and (4) the Establishment Clause have been severally impaired, due to the effect of the Regulatory Abortion Mandates, which places upon Plaintiffs a substantial burden, coercing them to decide between their religious beliefs or suffer a draconian penalty; due to the forced association with abortion coverage, which is an anathema to Plaintiffs, especially considering that they have had no notice whatsoever that they were contributing for abortions; and in so doing, upon information and belief, has the effect of Plaintiffs, the Churches especially, being seen as intentionally hypocritical, by funding abortion; and there has been no exemptions allowed for Plaintiffs, despite the prior exemptions given out to similarly situated individuals.

148. For the reasons set forth above at paragraphs 110–119, 120–127, 128–137, 138–144, Plaintiffs' rights under the First Amendment, Free Speech Clause, in conjunction with the Constitutional protections of (5) Expressive Association and Associational Rights; (6) Equal Protection Clause; (7) Establishment Clause have been equally violated by the Model Language and Regulatory Abortion Mandates. In particular, the providing of insurance to their employees is seen as a moral duty by religious employers, and by providing insurance that includes coverage for abortions forces the religious employers to essentially speak out against abortion in the pulpit,

but to condone it through health insurance coverage. Had there been disclosure by NYSDFS or an opportunity to obtain exemptions, these problems would not exist, but similarly situated individuals/employers have been, upon information and belief, given exemptions, whereas Plaintiffs were not allowed the same opportunity.

149. For the reasons set forth above at paragraphs 128–137, 138–144, 110–119, Plaintiffs' rights under the First Amendment's Expressive Association and Associational Rights in conjunction with, (8) the Equal Protection Clause; and (9) Establishment Clause, have also been severely compromised by the Model Language and Regulatory Abortion Mandates. For one, the unknown years of payment for premiums, some of which went to include abortions is inherently a forced and unconstitutional association thrust upon the Plaintiffs, especially considering that the First Amendment rights of Association protect against forced inclusion into a group (here, one that supports abortion), which is unwanted by Plaintiffs, whose own viewpoint (here, as abortion being a "grave" "moral" sin) has been substantially affected by the Model Language and Regulatory Abortion Mandates, both which force inclusion of Plaintiffs into a group where their viewpoint is in total opposition to the rest and if forced to remain, would substantially effect the ability of the Plaintiffs (religious employers/churches especially) to advocate their own viewpoint and from their own constitutionally protected associations. Further harm is demonstrated by the forced exclusion of Plaintiffs and the inclusion of similarly situated employers or persons who, upon notice and belief, received exemptions, and through this unlawful

treatment, the including/excluding alike violates the Establishment Clause, which prohibits the state from inhibiting or advancing religion or otherwise advancing the interest of certain denominations/religious employers, while denying the same to such similarly situated persons as Plaintiffs.

150. For the reasons set forth above at paragraphs 138–144, 110–119, Plaintiffs' rights under the Equal Protection Clause, in conjunction with (10) the Establishment Clause have been similarly infringed upon by the Model Language and Abortion Mandates. As previously stated, the treatment of similarly situated individuals in different ways violates the Equal Protection Clause of the Fourteenth Amendment, and by doing so using religious based classifications, the Establishment Clause has equally been violated as the State has, upon information and belief, used the Model Language to target certain religious groups and/or persons by refusing to provide an exemption to Plaintiffs, while at the same time, providing exemptions to other religious denominations and/or similarly situated persons (to the Plaintiffs), demonstrating a total lack of constitutionality under the Establishment Clause, by advancing religion in the first place and by advancing the interests of only certain religions in the second.

151. For the reasons set forth above at paragraphs "1" through " 144" herein, the NYSDFS Regulatory Abortion Mandates substantially burden Plaintiffs' hybrid rights claims under: the United States Constitution in the following combinations: (1) Free Exercise Clause with Free Speech; (2) Free Exercise Clause with Expressive Association and Associational Rights; (3) Free Exercise Clause with the Equal

Protection Clause; (4) Free Exercise Clause with the Establishment Clause; (5) Free Speech with Expressive Association and Associational Rights; (6) Free Speech with the Equal Protection Clause; (7) Free Speech with the Establishment Clause; (8) Expressive Association and Associational Rights with the Equal Protection Clause; (9) Expressive Association and Associational Rights with the Establishment Clause; and (10) Equal Protection Clause with the Establishment Clause.

FOURTEENTH CAUSE OF ACTION

INJUNCTIVE RELIEF
INVALIDITY OF NYSDFS
ABORTION MANDATES
(CPLR §§ 6301 AND 6311)

152. Plaintiffs repeat and reallege paragraphs "1" through "151" of the verified complaint and incorporate same herein as more fully set forth.

153. Because of the NYSDFS Regulatory Abortion Mandates have directly infringed upon Plaintiffs' rights arising under the New York State Constitution, New York Human Rights Law, Religious Corporations Law, and State Administrative Procedures Act as enumerated herein, Plaintiffs have been greatly and irrevocably injured.

154. Because the issuance of NYSDFS Regulatory Abortion Mandates have infringed upon Plaintiffs' rights under the United States Constitution, as enumerated herein, Plaintiffs have been greatly and irrevocably injured.

155. Unless the Defendants are enjoined by this Court from enforcing the Regulatory Abortion Mandates imposed by NYSDFS, Plaintiffs will be

required to subscribe to and fund group health benefit plans that will, as a result of the aforementioned Regulatory Abortion Mandates, include abortion coverage.

156. Unless Defendants are enjoined by this Court from enforcing the Regulatory Abortion Mandates imposed by the NYSDFS, Plaintiffs' group benefit plan providers, have non-discretionary, regulatory duties to include abortion insurance in Plaintiffs' group benefit plans as renewed.

157. Unless Defendants are preliminarily and permanently enjoined from enforcing the Abortion Mandates imposed by the NYSDFS, Plaintiffs will be forced to choose between violating their sincerely held religious and conscience beliefs regarding the moral impermissibility of abortion and violating their sincerely held religious beliefs regarding the moral obligation of employers to provide a dignified livelihood, including fair, adequate and just employment benefits to their employees.

158. The injury to Plaintiffs, attributable to being coerced, is that Plaintiffs must choose between violating their sincerely held religious and conscience beliefs regarding the moral impermissibility of abortion and violating their sincerely held religious beliefs regarding the moral obligations of employers to provide a dignified livelihood, including fair, adequate and just employment benefits, to their employees, or face payment of draconian penalties is serious and irrevocable.

159. Unless Defendants are preliminary and permanently enjoined Plaintiffs' ability to live and engage in missional practices in accordance with their

sincerely held religious and conscience beliefs will continue to be abridged. The injury to Plaintiffs, attributable to being coerced into engaging in practices violative of Plaintiffs' sincerely held religious beliefs, is serious and irrevocable.

160. If Defendants are enjoined by this Court from enforcing the Regulatory Abortion Mandates imposed by NYSDFS, the Defendant providers will then furnish Plaintiffs with group benefit health plans that comply with their religious teaching and conscience rights and will not include insurance coverage covering abortion.

161. Plaintiffs have no other cognizable, adequate or speedy remedy at law available to them.

WHEREFORE, Plaintiffs respectfully request judgment declaring the rights and other legal relations of the parties as follows:

1. That a judgment of this Court be entered, pursuant to Civil Practice Law and Rules §3001, in favor of Plaintiffs declaring that:

   a. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the guarantee of the right to freely exercise and enjoy religion and the liberty of conscience right contained in Article 1, Section 3 of the New York Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

b. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Establishment Clause contained in Article 1, Section 3 of the New York Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

c. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Preference Clause guarantee contained in Article 1, Section 3 of the New York Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

d. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Free Speech provisions contained in Article 1, Section 8 of the New York Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

e. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Expressive Association and Associational provisions contained in the New York Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

f. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the undisclosed Abortion Mandates requiring abortion coverage violate the separation of powers doctrine and rulemaking provision of Articles III, § I, IV, § 8 of the New York State Constitution.

g. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the protection contained in the Human Rights Law (Executive Law, Section 296(11)) and are, accordingly, inoperative and unenforceable as a matter of law;

h. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the safeguards contained in the Religious Corporations Law (N.Y. Relig. Corp. Law §§26,5 (McKinney 1990)) and are, accordingly, inoperative and unenforceable as a matter of law;

i. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Establishment Clause of the First Amendment of the United States Constitution, and are, accordingly inoperative and unenforceable as a matter of law;

j. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Free Exercise Clause of the First Amendment of the United States Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

k. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Free Speech and Association Liberty provisions of the First Amendment to the United States Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

l. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and are, accordingly, inoperative and unenforceable as a matter of law;

m. NYSDFS Regulatory Abortion Mandates, Model Language, Section IX [M] and the Undisclosed Abortion Mandates requiring abortion coverage violate Plaintiffs' "hybrid rights" claims arising from:

   i. (1) Free Exercise Clause with Free Speech; (2) Free Exercise Clause with

Expressive Association and Associational Rights; (3) Free Exercise Clause with the Equal Protection Clause; (4) Free Exercise Clause with the Establishment Clause;

ii. (5) Free Speech with Expressive Association and Associational Rights; (6) Free Speech with Equal Protection Clause; (7) Free Speech with the Establishment Clause;

iii. (8) Expressive Association and Associational Rights with the Equal Protection Clause; (9) Expressive Association and Associational Rights with the Establishment Clause; and

iv. (10) the Equal Protection Clause with the Establishment Clause.

n. All of the aforementioned hybrid claims demonstrate the NYSDFS Regulatory Abortion Mandates, Model Language and Undisclosed Abortion Mandates violate Plaintiffs' "hybrid rights" and are, accordingly, inoperative and unenforceable as a matter of law.

2. That Defendants Maria T. Vullo, Superintendent, New York State Department of Financial Services be preliminarily and permanently enjoined as follows:

That neither Defendant Maria T. Vullo, Superintendent, New York State Department of Financial Services, nor any other agency of the State of New York or the United States issue any "directives" to Plaintiffs or others similarly

situated, or institute any administrative or judicial actions seeking enforcement of the subject NYSDFS Regulatory Abortion Mandates and that the NYSDFS be directed to provide Plaintiffs with exemptions from funding and providing abortion coverage in Plaintiffs' health insurance benefits plans and contracts.

3. That this Court grant Plaintiffs such other and further relief as to this Court may be deemed just, proper and equitable.

DATED:
November 21, 2017

Respectfully submitted,

TOBIN AND DEMPF, LLP
s/ Michael L. Costello
Michael L. Costello
Attorneys for Plaintiffs
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515 Broadway
Albany, NY 12207
(518) 463-1177
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VERIFICATION

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

Edward B. Scharfenberger, being duly sworn, deposes and says: that he is the Bishop of The Roman Catholic Diocese of Albany, New York and chair of the Board of Directors of Catholic Charities of the Diocese of Albany plaintiffs in the above-captioned complaint. I have read the foregoing Complaint for Declaratory and Injunctive Relief and know its contents. The Complaint is true to the best of my knowledge, except as to any matters alleged on information and belief, and as to those matters, I believe them to be true.

s/ Edward B. Scharfenberger
Edward B. Scharfenberger

Sworn to before me this
21st day of December, 2017

s/ Virginia M. Daley
Notary Public

Virginia M. Daley
NOTARY PUBLIC STATE OF NEW YORK
ALBANY COUNTY
[Illegible] #01DA6063124
COMM. EXP. 8/27/2021

APPENDIX N

NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
FORTY-EIGHTH AMENDMENT TO
11 NYCRR 52
(INSURANCE REGULATION 62)

MINIMUM STANDARDS FOR FORM, CONTENT AND SALE OF HEALTH INSURANCE, INCLUDING STANDARDS OF FULL AND FAIR DISCLOSURE

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301, 3201, 3217, 3221, 4235, 4237, and 4303 of the Insurance Law, do hereby promulgate the Forty-Eighth Amendment to Part 52 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 62), to take effect 60 days after publication of the Notice of Adoption in the State Register and to apply to all policies and contracts issued, renewed, modified or amended after that date, to read as follows:

(ALL MATERIAL IS NEW)

Subdivision 52.1(p) is added as follows:

(p)(1) Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the

exceptions apply to medically necessary abortions. As a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

(2) Section 52.16(o) of this Part makes explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in this State shall not exclude coverage for medically necessary abortions. Section 52.16(o) of this Part also provides for an optional, limited exemption for religious employers as provided in that section while ensuring that coverage is maintained for any insured seeking a medically necessary abortion.

Subdivision 52.2(y) is added as follows:

(y) *Religious employer* means an entity for which each of the following is true:

(1) The inculcation of religious values is the purpose of the entity.

(2) The entity primarily employs persons who share the religious tenets of the entity.

(3) The entity serves primarily persons who share the religious tenets of the entity.

(4) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Subdivision 52.16(o) is added as follows:

(o)(1) No policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary. Coverage for

in-network abortions that are medically necessary shall not be subject to copayments, or coinsurance, or annual deductibles, unless the policy is a high deductible health plan as defined in section 223(c)(2) of the Internal Revenue Code in which case coverage for medically necessary abortions may be subject to the plan's annual deductible.

(2) Notwithstanding any other provision of this Part, a group or blanket policy that provides hospital, surgical, or medical expense coverage delivered or issued for delivery in this State to a religious employer may exclude coverage for medically necessary abortions only if the insurer:

(i) obtains an annual certification from the group or blanket policyholder or contract holder that the policyholder or contract holder is a religious employer and that the religious employer requests a contract without coverage for medically necessary abortions;

(ii) issues a rider to each certificate holder (i.e., primary insured) at no premium to be charged to the certificate holder (i.e., primary insured) or religious employer for the rider, that provides coverage for medically necessary abortions subject to the same rules as would have been applied to the same category of treatment in the policy issued to the religious employer. The rider must clearly and conspicuously specify that the religious employer does not administer medically necessary abortion benefits, but that the insurer is issuing a rider for coverage of medically necessary abortions, and shall provide the insurer's contact information for questions; and

(iii) provides notice of the issuance of the policy and rider to the superintendent in a form and manner acceptable to the superintendent.

NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo Governor	Maria T. Vullo Superintendent

I, Maria T. Vullo, Superintendent of Financial Services, do hereby certify that the foregoing is the Forty-Eighth Amendment to Part 52 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 62) signed by me on May 10, 2017 pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301, 3201, 3217, 3221, 4235, 4237, and 4303 of the Insurance Law, to take effect 60 days after publication in the State Register.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed rule was published in the State Register on February 8, 2017. No other publication or prior notice is required by statute.

s/ Maria T. Vullo
Maria T. Vullo
Superintendent of Financial Services

Date: June 5, 2017

ONE STATE STEET, NEW YORK, NY 10004 |
WWW.DFS.NY.GOV

APPENDIX O

Assessment of Public Comments for the Forty Eighth Amendment to 11 NYCRR 52 (Insurance Regulation 62).

The Department of Financial Services ("Department") received comments from two hundred and sixty nine interested persons in response to its proposed amendment to Insurance Regulation 62, some of which were incorporated into the rulemaking, discussed below.

Comment:

The vast majority of commenters requested that the Department limit the proposed exemption for religious employers and qualified religious organization employers contained in proposed subdivision 52.1(p), on the ground that such a broad exemption is not required by law. Most requested that the Department utilize only the religious employer exemption contained in the Women's Health and Wellness Act ("WHWA"). Some commenters called for the elimination of any exemption for any religious employers, asserting that New York law does not require an exemption. One commenter asserted that the religious exemption did not go far enough and should be strengthened.

Response:

In response to the hundreds of comments related to the exemption for religious employers, the Department has decided to modify the proposed amendment to reflect an approach offered by a

majority of commenters and which balances the substantial interest of the state in providing meaningful access to health care services, the interests of religious employers, and the constitutional rights of women. The Department has directly incorporated the religious employer exemption from the WHWA and has removed any additional exemptions.

Neither State nor Federal law requires the Department to offer an exemption from this neutral regulation of general applicability. However, recognizing that the legislature saw fit, in enacting the WHWA, to provide a limited exemption for houses of worship and similar entities in the sphere of reproductive care and that this regulation nevertheless provides all insured women with access to contraceptive care, the Department has concluded that utilizing the same exemption in the context of abortion coverage is appropriate and provides adequate protection of both the rights of women and religious employers in New York.

While individuals and organizations have recently invoked the federal Religious Freedom Restoration Act ("RFRA") to assert religious objection to federal regulations of general applicability, most notably in the United States Supreme Court case of *Burwell v. Hobby Lobby Stores, Inc.*, the RFRA does not apply to state law or regulation. The Department has determined that the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families weighs far more heavily than the interest of

business corporations to assert religious beliefs in the provision of health insurance to their employees. This is especially true in that these businesses are making decisions about health insurance coverage for their employees, where employees have little to no power in guiding the decision and are not required to agree with the employer's religious beliefs.

Accordingly, the Department has maintained the religious employer exemption modeled after the WHWA but has eliminated the added exemption for other groups that was contained in the proposed regulation, but not in WHWA or otherwise found in New York law. This change is consistent with the requests of over two hundred commenters.

Comment:

One commenter requested that the Department eliminate the requirement that religious employers certify that they have religious objection to medically necessary abortions to receive the exemption. The commenter suggests that this requirement goes beyond the WHWA's requirement for an exemption from contraceptive coverage, where a religious employer need only request a policy without coverage.

Response:

The Department has made the suggested change as it achieves the Department's purpose of aligning the religious employer exemption under the proposed amendment with the WHWA exemption, in order to align coverage for medically necessary abortion services consistent with other reproductive health coverage in New York.

Comment:

Two commenters requested the Department to add language that indicates that the medical necessity determination is one which is solely within the discretion of the insured's physician.

Response:

Medical necessity determinations are regularly made in the normal course of insurance business by a patient's health care provider in consultation with the patient, subject to the utilization review and external appeal procedures in Article 49 of the Insurance Law and Article 49 of the Public Health Law. The Department has therefore clarified the proposed amendment to incorporate this standard and to also explicitly state that determinations of medical necessity cannot be made or impacted by any other individual including, without limitation, a patient's employer or the group policyholder or contract holder covering the patient.

Comment:

In a number of different contexts a few commenters asserted concerns over the proposed rider system for insureds whose employer qualifies for an exemption. These commenters suggested that the rider system does not adequately protect access to reproductive care.

Response:

With the changes made to the religious employer exemption the Department believes that the rider system will be utilized sparingly. Given that the rider must be provided at no cost to the insured and that the insured automatically receives the rider, the

Department believes that the rider system as contained in the proposed amendment provides adequate protection of medically necessary abortion coverage while balancing the concerns of certain religious employers with an objection to providing medically necessary abortion coverage. The Department notes that a similar system, applicable to the same religious employers, works in the context of contraception. Therefore, the Department did not adopt any changes to the mechanics of the rider system in the rulemaking. The Department will utilize its full authority to ensure that woman have the insurance coverage required by law.

Comment:

One commenter requested that the Department delay the publication of the final regulation until November to align the effective date with the beginning of the calendar year. The commenter suggested that this would allow plans time to operationalize the regulation's requirements.

Response:

Existing policies must already include coverage for medically necessary abortions, and the new rules included in the proposed regulation will not impair existing policies or contracts. The Department has provided clarifying language in the rulemaking that further explains the amendment does not impair contracts in force and applies to policies and contracts issued, renewed, modified or amended after the effective date of the amendment.

Comment:

A limited number of commenters suggested that the proposed regulation exceeds the Department's

authority. One commenter suggested that the Department lacked authority to promulgate this regulation at all. The commenter argued that Insurance Law Section 3217 limits the Department's ability to regulate as to minimum standards of health insurance policies to the five enumerated purposes set forth in subsection (b) of that statute. The commenter goes on to argue that *Health Insurance Association of America v. Corcoran* is directly on point to the Department's regulatory authority under Section 3217 and precludes this regulation. One additional commenter suggested that the requirement that medically necessary abortions be covered at no cost exceeds the Department's authority.

Response:

The State Administrative Procedures Act does not require the Department to respond to conclusory legal arguments in the context of an Assessment of Public Comment. Nonetheless, construing these challenges to the Department's authority as a suggested alternative to the proposed amendment, namely that the Department do nothing, the Department rejects the suggestion.

The Department has determined that it is necessary that this amendment be made to protect consumers of health insurance products. Medically necessary abortion coverage is already required under the Insurance Law through regulations requiring coverage of all medically necessary surgeries, doctor visits, and prescriptions. To avoid consumer confusion and to provide clarity surrounding this coverage, the Department, in response to concerns observed in the markets that inconsistent plan application of the

coverage for medically necessary abortions was leading to improper coverage exclusion and consumer misunderstanding, has proposed this necessary amendment to Regulation 62, which will provide clarity and simplification surrounding the coverage, and will align it more uniformly with other coverage for reproductive care in New York. The Department has authority to prescribe regulations and in doing so may interpret statutes: the amendment is entirely consistent with Section 3217 and with the public policy of ensuring and advancing women's full access to health care services, in particular reproductive care, which the Legislature has consistently set forth in the Insurance Law.

Indeed the elimination of cost sharing for medically necessary abortions and the religious employer exemption are taken directly from aspects of the Insurance Law where the Legislature signaled New York public policy of providing and advancing comprehensive reproductive and family planning coverage for women without cost sharing. The Department has the authority to promulgate this amendment, and has determined that this amendment is necessary to implement New York's policy and law supporting women's full access to health care services.

Comment:

One insurer commenter asked for clarification as to whether the rider required by this amendment could be bundled with other religious riders found in the group markets.

Response:

Given the important differences between this rider and other coverage riders, the Department has determined that a rider issued pursuant to an authorized exemption contained in the amendment may not be combined with other religious riders. Importantly, the rider for medically necessary abortion coverage must be provided at no charge to the insured and must be provided immediately. To combine the rider for medically necessary abortion coverage with other riders, such as a rider under the contraceptive mandate of the WHWA, which need only be offered, not provided, and must be paid for by the employee, presents too much potential for consumer confusion and insurer abuse.

Comment:

One insurer commenter requested that the Department modify the proposed amendment to allow all riders offered under the religious employer exemption to be uniform. Specifically, the commenter suggested that all riders provide medically necessary abortion services at no cost sharing, even plans that are HSA-eligible. The commenter suggests that without this change there will be a substantial administrative burden with a large number of different riders being required.

Response:

Given the changes to the religious employer exemption contained in the rulemaking, the Department does not share the concern that there will be a substantial administrative burden. As with the WHWA exemption, the burden on insurers to facilitate the limited rider system will be minimal. As the

revisions contained in the rulemaking reduce the likelihood of varying riders, the Department did not adopt the commenter's suggested modification to the rulemaking.

Comment:

One commenter sought clarification from the Department whether an insurer has the discretion to permit the religious employer to use the exemption. The commenter drew from the language of the proposed amendment to suggest that the religious employer would request the exemption and the insurer has the discretion whether or not to grant it.

Response:

The discretion to avail themselves of the religious employer exemption rests with the religious employer, provided that the religious employer meets all requirements of the exemption. An insurer who is otherwise permitted to decline to write a policy may decline to write a policy that excludes coverage for medically necessary abortions, but does not have discretion whether or not to grant an exemption under the amendment if the requirements are met. The Department has determined that no further clarifying changes to the proposed amendment are necessary.

APPENDIX P

Regulatory Impact Statement for the Forty-Eighth Amendment to 11 NYCRR 52 (Insurance Regulation 62).

1. Statutory authority: Financial Services Law ("FSL") Sections 202 and 302 and Insurance Law ("IL") Sections 301, 3201, 3217, 3221, 4235, 4237, and 4303.

FSL Section 202 establishes the office of the Superintendent of Financial Services ("Superintendent"). FSL Section 302 and IL Section 301, in pertinent part, authorize the Superintendent to prescribe regulations interpreting the IL and to effectuate any power granted to the Superintendent in the IL, FSL, or any other law.

IL Section 3201 subjects policy forms to the Superintendent's approval.

IL Section 3217 authorizes the Superintendent to issue regulations to establish minimum standards, including standards for full and fair disclosure, for the form, content and sale of accident and health insurance policies and subscriber contracts of corporations organized under IL Article 32 and Article 43, and Public Health Law Article 44.

IL Section 3221 prohibits a policy of group or blanket accident and health insurance, except as provided in IL Section 3221(d), to be delivered or issued for delivery in New York unless it contains in substance the provisions set forth therein or provisions that are in the opinion of the

Superintendent more favorable to the holders of such certificates or not less favorable to the holders of such certificates and more favorable to policyholders.

IL Section 4235 defines a group accident insurance policy, group health insurance policy, and group accident and health insurance policy.

IL Section 4237 defines a blanket accident insurance policy, blanket health insurance policy, and blanket accident and health insurance policy.

IL Section 4303 sets forth the benefits that every contract issued by a hospital service corporation or health service coverage must provide.

2. Legislative objectives: IL Section 3217 authorizes the Superintendent to issue regulations to establish minimum standards, including standards for full and fair disclosure, for the form, content and sale of accident and health insurance policies and subscriber contracts of corporations organized under IL Article 32 and Article 43, and Public Health Law Article 44. 11 NYCRR 52 (Insurance Regulation 62) was promulgated pursuant to this Section, and Section 52.16(c) of Regulation 62 prohibits a policy or contract from limiting or excluding coverage by type of illness, accident, treatment, or medical condition, except in certain limited circumstances.

This amendment accords with the public policy objectives that the Legislature sought to advance in IL Section 3217 by making explicit that individual, group and blanket accident insurance policies and contracts that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in New York may not exclude coverage for medically necessary abortions and must provide such coverage at no cost

sharing. The amendment also provides for an optional, limited exemption for religious employers while ensuring that medically necessary abortion coverage is maintained for any insured of a policy issued to a religious employer at no additional cost to the insured.

3. Needs and benefits: Section 52.16(c) of Regulation 62 already prohibits a policy or contract from limiting or excluding coverage by type of illness, accident, treatment, or medical condition, except in certain limited circumstances. None of the exceptions apply to medically necessary abortions. As a result, insurance policies and contracts that provide hospital, surgical, or medical expense coverage must include coverage for medically necessary abortions. This amendment makes explicit that individual, group and blanket accident insurance policies and contracts that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in New York may not exclude coverage for medically necessary abortions and must provide such coverage at no cost sharing.

In addition, the amendment provides for an optional, limited exemption for religious employers. However, the amendment still ensures that medically necessary abortion coverage is maintained for any insured of a policy issued to a religious employer at no additional cost to the insured by requiring an insurer to issue a rider to each certificate holder of a policy issued to the religious employer that provides coverage for medically necessary abortions, at no premium to be charged to the certificate holder or religious employer.

4. Costs: Since insurers already are required to provide coverage for medical necessary abortions,

insurers should not need to incur costs to file new policy or contract forms with the Superintendent. Insurers may incur costs to obtain annual certifications from religious employers that wish to exclude coverage for medically necessary abortions and to issue riders to each certificate holder at no premium to be charged to the certificate holder or religious employer under policies and contracts issued to such religious employers. However, these additional costs should be minimal.

This amendment is unlikely to impose compliance costs on the Department of Financial Services ("Department"). Any costs to the Department should be minimal and the Department expects to absorb the costs in its ordinary budget.

This amendment will not impose compliance costs on state or local governments.

5. Local government mandates: This regulation does impose a new mandate on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Insurers may need to obtain annual certifications from religious employers that wish to exclude coverage for medically necessary abortions and issue riders that provide coverage for medically necessary abortions at no additional premium to each certificate holder of a policy issued to such a religious employer.

7. Duplication: This amendment does not duplicate, overlap, or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: The Department considered adding an exemption for "qualified religious

organization employer" but decided to use the current exemption because it is more analogous to existing state law.

9. Federal standards: The regulation does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The regulation will take effect 60 days after publication of the Notice of Adoption in the State Register.

APPENDIX Q

N.Y. Comp. Codes R. & Regs. tit. 11, § 52.1 Preamble

* * *

(p)

(1) Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

(2) Section 52.16(o) of this Part makes explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in this State shall not exclude coverage for medically necessary abortions. Section 52.16(o) of this Part also provides for an optional, limited exemption for religious employers as provided in that section while ensuring that coverage is maintained for any insured seeking a medically necessary abortion.

* * *

N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2 Definitions

* * *

(y) *Religious employer* means an entity for which each of the following is true:

(1) The inculcation of religious values is the purpose of the entity.

(2) The entity primarily employs persons who share the religious tenets of the entity.

(3) The entity serves primarily persons who share the religious tenets of the entity.

(4) The entity is a nonprofit organization as described in section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

* * *

N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16 Prohibited provisions and coverages

* * *

(o)

(1) No policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary. Coverage for in-network abortions that are medically necessary shall not be subject to copayments, or coinsurance, or annual deductibles, unless the policy is a high deductible health plan as defined in section 223(c)(2) of the Internal Revenue Code in which case coverage for medically necessary abortions may be subject to the plan's annual deductible.

(2) Notwithstanding any other provision of this Part, a group or blanket policy that provides hospital, surgical, or medical expense coverage delivered or issued for delivery in this State to a religious employer may exclude coverage for medically necessary abortions only if the insurer:

(i) obtains an annual certification from the group or blanket policyholder or contract holder that the policyholder or contract holder is a religious employer and that the religious employer requests a contract without coverage for medically necessary abortions;

(ii) issues a rider to each certificate holder (i.e., primary insured) at no premium to be charged to the certificate holder (i.e., primary insured) or religious employer for the rider, that provides coverage for medically necessary abortions

subject to the same rules as would have been applied to the same category of treatment in the policy issued to the religious employer. The rider must clearly and conspicuously specify that the religious employer does not administer medically necessary abortion benefits, but that the insurer is issuing a rider for coverage of medically necessary abortions, and shall provide the insurer's contact information for questions; and

(iii) provides notice of the issuance of the policy and rider to the superintendent in a form and manner acceptable to the superintendent.

* * *

McKinney's Insurance Law § 3221

§ 3221. Group or blanket accident and health insurance policies; standard provisions

* * *

(22) (A) Every policy which provides hospital, surgical, or medical coverage and which offers maternity care coverage pursuant to paragraph five of this subsection shall also provide coverage for abortion services for an enrollee.

(B) Coverage for abortion shall not be subject to annual deductibles or coinsurance, including co-payments, unless the policy is a high deductible health plan as defined in section 223(c)(2) of the internal revenue code of 1986, in which case coverage for abortion may be subject to the plan's annual deductible.

(C) Notwithstanding any other provision, a group policy that provides hospital, surgical, or medical expense coverage delivered or issued for delivery in this state to a religious employer, as defined in item one of subparagraph (E) of paragraph sixteen of subsection (1) of this section, may exclude coverage for abortion only if the insurer:

(i) obtains an annual certification from the group policyholder that the policyholder is a religious employer and that the religious employer requests a policy without coverage for abortion;

(ii) issues a rider to each certificate holder at no premium to be charged to the certificate holder or religious employer for the rider, that provides coverage for abortion subject to the same rules as would have been applied to the same category of

treatment in the policy issued to the religious employer. The rider shall clearly and conspicuously specify that the religious employer does not administer abortion benefits, but that the insurer is issuing a rider for coverage of abortion, and shall provide the insurer's contact information for questions; and

(iii) provides notice of the issuance of the policy and rider to the superintendent in a form and manner acceptable to the superintendent.

(E) Notwithstanding any other provision of this subsection, a religious employer may request a contract without coverage for federal food and drug administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, such contract shall be provided without coverage for contraceptive methods. This paragraph shall not be construed to deny an enrollee coverage of, and timely access to, contraceptive methods.

(1) For purposes of this subsection, a "religious employer" is an entity for which each of the following is true:

(a) The inculcation of religious values is the purpose of the entity.

(b) The entity primarily employs persons who share the religious tenets of the entity.

(c) The entity serves primarily persons who share the religious tenets of the entity.

(d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

McKinney's Insurance Law § 4303

§ 4303. Benefits

* * *

(5) Notwithstanding any other provision of this subsection, a religious employer may request a contract without coverage for federal food and drug administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, such contract shall be provided without coverage for contraceptive methods. This paragraph shall not be construed to deny an enrollee coverage of, and timely access to, contraceptive methods.

(A) For purposes of this subsection, a "religious employer" is an entity for which each of the following is true:

(i) The inculcation of religious values is the purpose of the entity.

(ii) The entity primarily employs persons who share the religious tenets of the entity.

(iii) The entity serves primarily persons who share the religious tenets of the entity.

(iv) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

(ss)(1) Every policy which provides hospital, surgical, or medical coverage and which offers maternity care coverage pursuant to subsection (c) of this section shall also provide coverage for abortion services for an enrollee.

(2) Coverage for abortion shall not be subject to annual deductibles or coinsurance, including co-payments,

unless the policy is a high deductible health plan as defined in section 223(c)(2) of the internal revenue code of 1986, in which case coverage for abortion may be subject to the plan's annual deductible.

(3) coverage for abortion shall include coverage of any drug prescribed for the purpose of an abortion, including both generic and brand name drugs, even if such drug has not been approved by the food and drug administration for abortion, provided, however, that such drug shall be a recognized medication for abortion in one of the following established reference compendia:

(A) The WHO Model Lists of Essential Medicines;

(B) The WHO Abortion Care Guidance; or

(C) The National Academies of Science, Engineering, and Medicine Consensus Study Report.

(4) Notwithstanding any other provision, a group policy that provides hospital, surgical, or medical expense coverage delivered or issued for delivery in this state to a religious employer, as defined in paragraph five of subsection (cc) of this section, may exclude coverage for abortion only if the insurer:

(A) obtains an annual certification from the group policy holder that the policy holder is a religious employer and that the religious employer requests a contract without coverage for abortion;

(B) issues a rider to each certificate holder at no premium to be charged to the certificate holder or religious employer for the rider, that provides coverage for abortions subject to the same rules as would have been applied to the same category of treatment in the policy issued to the religious

employer. The rider shall clearly and conspicuously specify that the religious employer does not administer abortion benefits, but that the insurer is issuing a rider for coverage of abortion, and shall provide the insurer's contact information for questions; and

(C) provides notice of the issuance of the policy and rider to the superintendent in a form and manner acceptable to the superintendent.

* * *

APPENDIX R

Roman Catholic Diocese of Albany v. Emami, 142 S.Ct. 421 (Mem) (2021)

142 S.Ct. 421

Supreme Court of the United States.

ROMAN CATHOLIC DIOCESE

OF ALBANY, et al., Petitioners,

v.

Shirin EMAMI, Acting Superintendent, New

York Department of Financial Services, et al.

No. 20-1501.

November 1, 2021.

Case below, 185 A.D.3d 11, 127 N.Y.S.3d 171.

Opinion

On petition for writ of certiorari to the Appellate Division, Supreme Court of New York, Third Judicial Department. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Appellate Division, Supreme Court of New York, Third Judicial Department for further consideration in light of Fulton v. Philadelphia, 593 U.S. ——, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021). Justice Thomas, Justice Alito, and Justice Gorsuch would grant the petition for a writ of certiorari.